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1944

THE
LAW REPORTS
OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
AND
PEERAGE CASES.

Editor - - - - - RALPH SUTTON, K.C.
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Privy Council - - CHARLES CLAYTON, *Barrister-at-Law.*

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET,
LONDON, E.C.4.

BIBL. LONDIN UNIV.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1944, is as follows :—

In the First Series,
[1944] Ch.
In the Second Series,
[1944] K. B. [1944] P.
In the Third Series,
[1944] A. C.

The Scottish Law Reports are cited as follows :—

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Morison's Dictionary, or, the Collection of Old Cases	,,	Mor. Dict.

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[PRIVY COUNCIL.]

J. C.*
1943
Oct. 19.

ORTHODOX PATRIARCHATE OF JERUSALEM . . . . APPELLANT;

AND

MUNICIPAL CORPORATION OF JERUSALEM . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine — Rating — Exemption — Claim — Edicts and firmans — "Taxation"—Inclusion of municipal rates—Overriding statutory liability—Rates and Taxes (*Exemption*) *Ordinance* (*No.* 18 *of* 1938), *s.* 15 (*b*)—*Municipal Corporations Ordinance* (*No.* 1 *of* 1934), *s.* 102.

Throughout the Rates and Taxes (Exemption) Ordinance, 1938, a distinction is preserved between rates and taxes, and municipal rates are not included under the word "taxation" in s. 15 (*b*) thereof. Accordingly, a petition presented under that section by the appellant claiming exemption, by virtue of certain edicts and

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**Present :* LORD ATKIN, LORD THANKERTON, LORD PORTER, LORD CLAUSON and SIR GEORGE RANKIN.

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firmans, from the payment of municipal rates in respect of property within the area of the respondent municipality, was not authorized by the section and was incompetent. Further, even if exemption from municipal rates had been granted by the edicts and firmans in question, any such exemption could not remain available against rates levied under the Municipal Corporations Ordinance, 1934, which, by s. 102, conferred the power to levy rates in such terms as left no room for any implication of exemption and which contained no saving clause relative thereto.

Judgment of the Supreme Court of Palestine affirmed, but on a different ground.

APPEAL (No. 34 of 1941) from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal (July 31, 1940), which unanimously affirmed a judgment of the district court of Jerusalem (June 3, 1940) by which the appellant's petition, claiming exemption from the payment of any rates to the respondent corporation, was dismissed.

The following facts are taken substantially from the judgment of the Judicial Committee: The appellant, which owned in and around Jerusalem in the municipal area of the respondent many religious and charitable establishments and many secular buildings which were let either for dwellings or for hotels or shops and also lands occupied and unoccupied, with the last of which this appeal was in substance concerned, applied to the district court under s. 15 (*b*) of the Rates and Taxes (Exemption) Ordinance, 1938, for exemption from the payment of municipal rates. By that section "any State, "religious community or body, charitable organization or "educational institution to which this ordinance applies "claiming by virtue of any treaty or firman or any other "ground whatsoever any exemption from taxation other than "the exemptions for which provision is made in this ordinance, "may within one year from the commencement of the "ordinance petition the district court in accordance with the "provisions of the Crown Actions Ordinance and notwithstanding anything contained in that ordinance the provisions "thereof shall apply to such claims as though they were claims "which could be brought against the government under the "provisions of that ordinance." The appellant's claim to exemption was based on certain edicts and firmans, the earliest being dated in 625 A.D., and the latest about 1897, the statement of claim alleging, inter alia, that, by virtue of the edict of the Great Prophet and of the firmans granted by the Califs and Sultans of Turkey and as a result of long usage, the

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appellant did not pay any municipal rates to the Turkish government or any municipality and/or to the Palestine government. The respondent's statement of defence objected, inter alia, that the appellant's claim was wholly misconceived in point of law.

The district court and, on appeal, the Supreme Court (Trusted C.J., Rose and Khayat JJ.), held that municipal rates were included under the word "taxation" in s. 15 (*b*) of the ordinance of 1938 so as to render the procedure authorized by the section available to the appellant, but that the exemptions granted in the edicts and firmans did not relate to, or include, municipal rates, the trial judge further holding that, even if they did so apply, any such exemption came to an end on the enactment of the Municipal Corporations Ordinance, 1934, which contained no saving clause relative thereto. The appellant appealed.

1943, July 8, 12. *Sir Herbert Cunliffe K.C.* and *Kenelm Preedy* for the appellant. The appellant is exempted by edicts and firmans, going back for 1300 years, from the payment of all rates on its property in the municipal area of the respondent. Admittedly, at the time the edicts and firmans were made municipal institutions did not exist. There was then only one form of taxation, and the creation by the sovereign State in the exercise of its inherent powers of municipal bodies to which it delegated its powers is not sufficient to get rid of the existing law that the appellant is exempt from all taxation. [Reference was made to the definition of "taxation" and of "rates" in Webster's dictionary, and to the detailed provisions of the edicts and firmans in question.] None of these municipal bodies can impose any taxation unless authorized by the State. It is important to get away from the distinction that has grown up between rates and taxation. Rate is only taxation by another name. [Reference was made to the Urban Property Tax Ordinance (No. 23 of 1928), s. 8, and the Rural Property Tax Ordinance (No. 1 of 1935), s. 6.] If it had been the intention of the legislature to deprive the appellant of so long-standing an exemption it would not have done it except in the clearest terms. The application under s. 15 (*b*) was competent, for that section applies to both rates and taxes. For this purpose there is no essential difference between rating and taxation.

Comyns Carr K.C. and *D. C. Bartley* for the respondent.

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Section 15 (*b*) of the ordinance of 1938 has no application to local rates under the Municipal Corporations Ordinance, and the procedure prescribed by s. 15 (*b*) is wholly inapplicable to the present proceedings. Prima facie, " taxation " in s. 15 (*b*) does not include municipal rates: Crown Actions Ordinance, No. 30 of 1926. If that is right it disposes of the whole matter. The edicts and firmans have no application to this class of charge, and it is for the party claiming exemption of this sort strictly to make out his case: *The Queen* v. *Inhabitants of Aylesford* (1), which affords a good example of the distinction between rates and taxes and also shows that where exemptions are based on very ancient privileges, when circumstances were different from those of to-day and the class of charge was wholly unknown at that time, they should be viewed very closely by the courts so that they are not extended to cover something not included in the original grant. Even assuming, however, that the edicts and firmans included any exemptions from the payment of municipal rates, such exemption came to an end when the Municipal Corporations Ordinance, 1934, was enacted. Lastly, in the absence of any context to the contrary, prima facie the rule is that an exemption from taxation applies only to taxes which were in force at the time when the exemption was granted and to others of a like kind which have been substituted therefor: *Brewster* v. *Kidgill* (2), which has frequently been approved. On that ground, also, the appeal should be dismissed.

Sir Herbert Cunliffe K.C. replied, and on the last point taken for the respondent referred to Halsbury's Laws of England, vol. xxxi. (2nd ed.), p. 542, para. 718, and to *Pole-Carew* v. *Craddock* (3), *Associated Newspapers, Ld.* v. *City of London Corporation* (4), and *London Corporation* v. *Netherlands Steamboat Co.* (5). There is here a long series of edicts and firmans exempting from all kinds of taxation as then known, and the true inference is that they were intended to apply not only to existing taxation but to future taxation.

October 19. The judgment of their Lordships was delivered by LORD THANKERTON, who stated the facts and continued: The main question under s. 15 (*b*) is whether municipal rates

(1) (1860) 2 E. &. E. 538, 546.
(2) (1697) 12 Mod. 166.
(3) [1920] 3 K. B. 109.
(4) [1916] 2 A. C. 429.
(5) [1906] A. C. 263.

are included under the word "taxation," so as to render the procedure authorized by the section available to the appellant. Both courts have decided this point in favour of the appellant. There was a minor contention as to the absence of the Attorney-General, who was originally made a party to the proceedings, but who was dismissed from the case at the first hearing, as no claim was made against him by the appellant. Both courts decided against the respondent on this contention, and the contention was not revived before the Board. Their Lordships agree with the courts below that the arbitration award, dated October 21, 1935, in arbitration proceedings between the present appellant and the government of Palestine is of no assistance in the present proceedings as the award was not concerned with municipal rates and the present respondent was not a party to the arbitration proceedings.

The first question is whether the word "taxation" in s. 15 (*b*) of the Rates and Taxes (Exemption) Ordinance, 1938, includes municipal rates, so as to render the present proceedings competent. Their Lordships are unable to agree with the view expressed by the lower courts. The word may be used in either the more limited meaning or the wider meaning, which would include rates, and the question which meaning is intended must fall to be decided on the terms of the ordinance in question. So regarded, it appears clear to their Lordships that throughout the ordinance a distinction is preserved between taxes and rates. The title prescribed by s. 1 names both, and while part I relates to "Exemption from Municipal Rates," parts II and III relate respectively to exemptions from "The Rural Property Tax" and "The Urban Property Tax." Part I provides for exemptions from municipal property rates, municipal general rates and municipal education rates, and s. 102 of the Municipal Corporations Ordinance, 1934, is referred to for their meaning. In the opinion of their Lordships, it is not to be assumed that the narrower meaning of "taxes" used in parts II and III, in contrast with the use of "rates" in part I, is superseded by the use of the wider meaning of "taxation" in part IV. On the contrary, it is to be assumed that the narrower meaning was advisedly preserved in part IV. It follows that the present proceedings, which claim exemption from municipal rates, are not authorized by s. 15 (*b*) of the ordinance.

This view supersedes consideration of the appellant's contention that exemption from municipal rates is granted

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by the edicts and firmans founded on, but their Lordships desire to make two observations. In the first place, their Lordships are of opinion that the evidence in this case is unsatisfactory, and would be insufficient to enable a proper decision to be arrived at, if such a decision was necessary. Such matters as the historical setting of these documents, and the nature of certain taxes or imposts referred to, might well be more adequately ascertained and explained. In the second place, however, their Lordships desire to express their concurrence in the view of the trial judge, that, even if exemption from municipal rates had been granted by these edicts and firmans, such exemption could not remain available against rates levied under the Municipal Corporations Ordinance, 1934, which, by s. 102, confers the power to levy rates in such terms as to leave no room for any implication of exemptions, and which contains no saving clause to cover the appellant's claim. It follows that the appeal fails, and should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Stoneham & Sons.*

Solicitors for respondent: *Herbert Oppenheimer, Nathan & Vandyk.*

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CONSERVAS CERQUEIRA LIMITADA . APPELLANTS;

AND

H.M. PROCURATOR GENERAL . . . RESPONDENT.

IN THE MATTER OF PART CARGO EX S.S. "MONTE CONTES."

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR (ADMIRALTY JURISDICTION) (IN PRIZE).

Shipping—Prize—Condemnation—Evidence—Reasonable ground for suspicion by captor—Positive affirmative evidence by claimant.

Whereas in prize law it is sufficient for captors seeking condemnation by the Prize Court of seized property to establish that there is reasonable ground for suspicion that the property is subject to be condemned, the claimants whose property has been seized must show to the satisfaction of the court by affirmative evidence amounting to positive proof that the reasonable suspicion is unfounded, that the facts are such that there is nothing which would render the property good and lawful prize, and that they are entitled to the release of the goods as being their property. Accordingly, where condemnation of goods, seized when bound for a neutral port, was sought on the ground that they were conditional contraband in fact en route for an ultimate enemy destination, the claimants had to prove affirmatively what was the actual destination of the goods so far as they controlled or could control it and that it was such that they were not subject to the penalty of being condemned. The claimant, however, is not required to go so far as to prove that the goods will not find their way in one manner or another into enemy territory after they have been imported into a neutral country.

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* *Present:* Lord Atkin, Lord Thankerton, Lord Wright, Lord Porter and Lord Merriman.

The Louisiana [1918] A. C. 461, 464, applied.

Order of the Supreme Court of Gibraltar affirmed.

APPEAL (No. 40 of 1942) from an order of the Supreme Court of Gibraltar, Admiralty Jurisdiction, sitting in prize (April 14, 1942), condemning a part cargo of 3,428 cases of tinned fish, valued at approximately 10,000*l.*, shipped on board the Spanish steamship *Monte Contes* at Vigo for Barcelona. The shipment was made on November 24, 1941. On December 16, 1941, the goods were seized at Gibraltar, and on the same date a writ was issued and served on the vessel, claiming their condemnation on the ground, inter alia, of enemy destination. On February 25, 1942, a claim was entered on behalf of the owners of the goods, now represented by the present appellants, and the underwriters, on the ground, inter alia, that the goods were destined for Barcelona and were not going to an enemy destination. The appellants were Spanish nationals, and owned the factory at Vigo where the fish was canned. There was superimposed on the tins—which themselves bore inscriptions in five languages, including Spanish and Italian—a label giving a description of the goods in Spanish and Italian. The canned fish was shipped at Vigo and consigned to J. Garcia Castillo at Barcelona, and the ship was given clearance for Barcelona. At that time no canned fish could be exported from Spain without an export permit and no permit was granted at Vigo during November or December, 1941. The contract of affreightment was evidenced by a mate's receipt and not a bill of lading. There was a cargo book, but no manifest. The shippers had not obtained a navicert for the cargo, but, the appellants alleged, for a coastal

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voyage that was not necessary. The ship was searched at Gibraltar by the Contraband Control Service on December 16, 1941, and the canned fish was seized. The trial took place before Greene C.J., who rejected the claim and condemned the goods as lawful prize on the ground that they were conditional contraband destined for an enemy country, namely, Italy. The claimants appealed.

1943. July 22. *Paull K.C.* and *Devlin* for the appellants. The grounds for suspicion alleged by the respondent are (*a*) that there was no navicert covering the goods ; (*b*) that the printing round the tins was in a number of languages, but that there was a label attached on which the wording was in Spanish and Italian only ; and (*c*) that Barcelona was a port reasonably close to Italy from which the goods could be shipped to Italy. The second was the chief suspicion. The cargo was insured with a Bilbao insurance company for the voyage from Vigo to Barcelona against, inter alia, capture, at the tariff rate of 2·7 per cent. Had the voyage been to Italy the rate would have been 24 per cent. The cargo was of neutral origin, the property of neutral subjects, and had no enemy destination, and there was no reasonable suspicion justifying its seizure, the right inference from all the facts being that it was not destined for any enemy country. At the highest the suspicion aroused is a very slight one. The cargo was only conditional contraband, and, therefore, mere enemy destination is not sufficient to justify condemnation, and the destination point is substantially the only one in issue. It is further submitted that the Order in Council of July 31, 1940 (St. R. & O., 1940, No. 1436), which provides that " goods " consigned to any port or place by which they might reach " enemy territory or enemy armed forces and not covered by " a valid cargo navicert . . . . shall, until the contrary is " established, be deemed to have an enemy destination," ought not in this case to be given effect to inasmuch as it entails on neutrals an unreasonable degree of inconvenience and its terms are not unambiguous and clear, and the evidence is that in cases of vessels engaged in the coast trade a navicert is not required, although it is encouraged.

Sir David Maxwell Fyfe S.-G. and *Wilfrid Price* for the respondent were not called upon.

Nov. 1. The judgment of their Lordships was delivered by

LORD WRIGHT, who stated the facts and continued: The case is marked by a paucity of information. If it was for the Crown, as captor, to establish affirmatively that the goods were conditional contraband, it might well be that the proof was insufficient, but that is not the true position in prize law. Prize law has its own peculiar rules, as the Board recently explained in *The Prins Knud* (1). These peculiar rules have been developed out of the peculiar character of the issues to be determined and of the circumstances in which they arise and come before the court. Captors are entitled to seize property, ship or goods, if there is reasonable ground for suspicion that the property is subject to be condemned. The property must be brought by captors for adjudication into the Prize court by means of the issue and service of a writ. Persons claiming to be interested in the property may then enter appearance and file a claim. To succeed in their claim they must prove their title to the property, and establish that the facts are such that there is no cause to justify condemnation. Thus, the captors must show that the case is one involving reasonable suspicion. If they do so, and if no claim is made, or if the claim fails, the court will in due course condemn the property as prize, but on the side of the claimants positive proof to the satisfaction of the court is exacted. They have to prove that they are entitled to the release of the goods as being their property, and also that the facts are such that there is nothing which would render the property good and lawful prize. In other words, they must show by affirmative evidence that the reasonable suspicions were unfounded. That these are the two issues in such cases was stated by this Board in *The Louisiana* (2), in the judgment delivered by Lord Parker.

It will then be convenient to examine what the Crown, as captor here, alleges to constitute a case of reasonable suspicion, and, on the other hand, what facts the claimants allege, or seek to establish, in order to have the seizure set aside and the goods released. The contrast between the two sides is sometimes explained as depending on the onus of proof. In a sense that may be a true description, but more exactly the difference depends on what is the case of either side. The captor has to maintain his seizure by showing the case of reasonable suspicion in order to justify what he did. The claimant has to establish by evidence of fact his affirmative case, which he can do in a case like this by showing the precise character of

(1) [1942] A. C. 667.

(2) [1918] A. C. 461, 464.

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the adventure and showing that the ostensible destination is the ultimate destination. In the present case the ground of condemnation relied on is that the goods were conditional contraband, that is, were foodstuffs proceeding to an enemy destination for the use of the Italian armed forces or the Italian government. It has not been contested that such a destination would render goods liable to be condemned. What is disputed is that there was in fact such a destination. It is not that claimants have to prove a negative, but they have to prove affirmatively what was the actual destination of the goods and that it was such that they were not subject to the penalty of being condemned. In other words, if the court is of opinion, as the Chief Justice at Gibraltar was, that there was reasonable cause for seizing the goods, the appellants have to prove that Barcelona was the ultimate destination of the adventure so far as they controlled or could control it. Their Lordships do not go so far as the Chief Justice when he said that the claimant must prove that the articles will not find their way in one manner or another into enemy territory after they have been imported into the neutral country. Their Lordships are not aware of any authority which would justify this statement in its full breadth. Though seizure may be justified on the ground of suspicious circumstances for which the claimant could not be held responsible, it is different with condemnation, which in general would not be ordered because of an ulterior destination in respect of which the shippers were neither responsible nor privy: *The Baron Stjernblad* (1), but the decision of the Chief Justice is not affected by this point.

In their Lordships' judgment there were abundant circumstances to justify the finding of the Chief Justice that the consignment of tinned fish was subject to reasonable suspicion. In the first place, the consignment was large in quantity and value. Tinned fish is a convenient and portable foodstuff peculiarly suitable for use by armed forces in the field. It could form a valuable addition to the food resources of Italy available to the Italian government, which could direct it to the use either of the army or civil population. Barcelona was a convenient port for shipment along the coast to Italy. In addition to this obvious ground of suspicion, the shipping documents, to which in a prize court the preliminary investigations are directed, were of the most suspicious character. There

(1) [1918] A. C. 173.

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was no manifest and no bill of lading in respect of the goods. What is called the mate's receipt did not give the name of the consignee. It is well established that where there is a question of contraband a bill of lading "to order," or a shipping document which does not specify a consignee at the neutral port whose identity and responsibility can be investigated, is in itself a suspicious circumstance. Even a named consignee may turn out to be merely a cover for an enemy agent: *The Louisiana* (1). Where, however, no consignee is named at all, the goods remain under the control of the shipper. There is, then, no clue as to the person by whom they will be dealt with at the neutral port, which is the ostensible destination, or in what manner they will be dealt with. In war time a prudent shipper would realize that the failure to name a consignee, whose identity and position in the neutral port can be investigated, is a defect in the ship's papers which will normally be regarded in a prize court as a subject of reasonable suspicion. It is a further matter of adverse suspicion that there was no navicert for the goods. This document would normally be attached to the manifest, if there had been a manifest, and, even if it is not obligatory in the case of a coasting voyage such as a voyage from Vigo to Barcelona, to procure a navicert, it would, at least, be a natural and ordinary precaution. It is here unnecessary to rely on arts. 2 and 3 of the Order in Council, Reprisals (Navicerts), German and Italian Restriction (S. R. & O., 1940, No. 1436, dated July 31, 1940), in particular art. 3, sub-cl. 1, which provides that goods consigned to any port or place from which they might reach enemy territory or the enemy armed forces, should, if not covered by a valid navicert, be deemed to have an enemy destination until the contrary is established. The Chief Justice did not found his decision on the order in council, nor do their Lordships. The absence, however, of a navicert, which it was admitted the vice-consul at Vigo might have given in a proper case if applied for, may fairly be regarded as in some degree a further element of suspicion. Their Lordships do not, therefore, need to consider questions which might be raised as to the validity and effect of the order in council. One further circumstance of suspicion may be mentioned—that is, the strip of paper which was wrapped round the sides of the tins. The tins themselves had printed on the metal a description of the contents in various languages, including English and Italian.

(1) [1918] A. C. 461.

This is not a matter which could call for comment, but the superimposed paper wrapper had a description only in Spanish and Italian. This may be taken to contemplate the probability that the tins would go to Italy. It would not in itself raise a case of reasonable suspicion, though it does also to some extent go to support the other elements which point to an Italian destination.

Their Lordships are of opinion that the various circumstances to which they have adverted constitute a very strong case of reasonable suspicion. It must now be seen how the appellants claim to show that Barcelona was not merely the ostensible, but, so far as rested on the appellants, the ultimate, destination of the goods. The proper witness to prove that the real object of the adventure was to send the goods to a destination other than the enemy in Italy was the responsible representative of the claimant company. He could have produced any contracts under which the goods were shipped and correspondence with consignees or buyers or agents for disposal of the goods in Barcelona. He could have explained the circumstances which led to the shipment, the nature of the market or demand for tinned fish in Barcelona, and that such a shipment was made in the ordinary course of trade. No such person was called. No such evidence was given by anybody. The evidence which was given, that tinned fish was labelled in different languages, relates merely to a not very important aspect. In truth, there was nothing that could fairly be regarded as affirmative evidence to dissipate the suspicious character of the case or to show that Barcelona was intended or contemplated by the appellants as the real and ultimate destination. Their Lordships, therefore, see nothing to justify them in differing from the judgment of the Chief Justice condemning the cargo of 3,428 cases of tinned fish as destined for Italy and as conditional contraband. The court is entitled to take notice that a large consignment of foodstuff such as that in question is to be regarded as calculated to increase the total war effort of Italy, whether as intended to be actually supplied to the armed forces or for feeding the civil population behind the lines. The court can also take notice that if there is, as suggested, a Spanish decree forbidding export of contraband to Italy, such decree may be, and frequently is, subject to evasion.

Counsel for the appellants has contended that a decision against the appellants can only be based on findings of fact

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which go beyond the legitimate limits of judicial notice, and has relied on certain observations in the *Commonwealth Shipping Representative* v. *P. & O. Branch Service* (1), to the effect that, though the court may take judicial notice of the existence of a state of war between this country and another, it may not take judicial notice of particular facts. The argument appears to be that judicial notice could not be taken of facts such as the position of Genoa as a war base of supplies in Italy, or a practice of the Italian government, as ruler of a totalitarian State, to take the goods for its own use or for disposal in whatever way would best help the war effort. No doubt, these, and similar matters, must be considered before the court can arrive at a case of reasonable suspicion, but, in their Lordships' opinion, these are matters of common notoriety which, as on one occasion Lord Stowell said, could be acted on by the judge in a prize court. Similarly, in *The Rosalie and Betty* (2), Lord Stowell said of the duty of judges of prize courts, " they are not to shut their eyes to what is generally " passing in the world . . . . Not to know these facts as " matters of frequent and not unfamiliar occurrence, would be " not to know the general nature of the subject upon which " the court is to decide ; not to consider them at all, would " not be to do justice " (3). Lord Stowell was there dealing with the various devices used to cover property of the enemy. The same may be truly predicated of the devices used to cover the conveyance of contraband to an enemy destination, particularly where the adventure involves a continuous voyage beyond the ostensible to the actual destination. The present case strikingly illustrates how helpless a prize court would be but for the rules which it has developed of proceeding in the first stage on reasonable suspicion based largely on its experience of " the general nature of the subject." A shipper who made the shipping documents meagre and uninformative and abstained from giving evidence at the trial would get away with the goods but for the rules on which the court acts. The analogy of the English criminal law that a man is presumed to be innocent until he is proved guilty cannot be applied in these cases for many reasons. One is that it is not a criminal offence for a neutral to carry contraband, though the goods may suffer the penalty of confiscation. The other is that prize courts, for good reasons as already explained, have

(1) [1923] A. C. 191.
(2) (1800) 2 C. Rob. 343.
(3) Ibid. 344.

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adopted their own rules. The claimant is not a prisoner on his trial, but a party who appears to establish his own case that the goods should be released to him. After all, the claimant who knows the true facts is the person who can dissipate the suspicion, if the circumstances are such that he can do so. If he is to succeed in his claim it is for him to satisfy the court. In the result, in their Lordships' judgment the decree of the Chief Justice should be upheld and the appeal dismissed with costs. They will humbly so advise His Majesty.

Solicitors for appellants: *William A. Crump & Son.*
Solicitor for respondent: *The Treasury Solicitor.*

Distinguished. ILLSTON & ROBSON, LTD. *v.* SMITH. [1948] 1 All E.R. 834.

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Nov. 1, 2, 3, 4; *Dec.* 7.

JONES . . . . APPELLANT;

AND

AMALGAMATED ANTHRACITE COLLIERIES LIMITED . . . . RESPONDENTS.

Distinguished. ILLSTON & ROBSON, LD. *v.* SMITH. [1948] **A. C. 384**
YEOMAN'S *v.* GODDEN. [1948] **A. C. 401**

Workmen's compensation — Assessment — Partial incapacity — "Earnings"—Workman conscripted for army—Army pay less than pre-accident wages—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 3 (i).

By s. 9, sub-s. 3 (i) of the Workmen's Compensation Act, 1925: "If the maximum weekly payment would, had the incapacity "been total incapacity, have amounted to twenty-five shillings "a week or upwards, the weekly payment in case of partial "incapacity shall be one-half the difference between the amount "of the average weekly earnings of the workman before the "accident and the average weekly amount which he is earning "or is able to earn in some suitable employment or business after "the accident . . . ."

Before June 15, 1932, the appellant was employed by the respondents as a collier, his wages averaging 2*l.* 10*s.* 8*d.* a week. On that day he met with an accident which rendered him totally incapacitated for work and he was paid compensation on that basis until 1935, when he began work above ground. Until November 15, 1937, he received compensation for partial incapacity based on the difference between his earnings before the accident and those of his work above ground, but thereafter, owing to an

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**Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD WRIGHT.

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increase in wage-rates, his earnings equalled or exceeded 2*l.* 10*s.* 8*d.* a week, and, consequently, compensation ceased. His average weekly earnings rose to 3*l.* 15*s.* 4*d.* by September 30, 1940, when, though still partially incapacitated, he was called up for service in the army under the National Service (Armed Forces) Act, 1939, his pay and allowances amounting to 2*l.* 0*s.* 9*d.* a week. On May 11, 1942, he applied under s. 9, sub-s. 3 (i), of the Workmen's Compensation Act, 1925, for compensation for partial incapacity on the ground that before the accident he was earning 2*l.* 10*s.* 8*d.* a week and now he was earning 2*l.* 0*s.* 9*d.* a week, so that he was entitled to 4*s.* 11½*d.* a week, being half the difference between his pre-accident wages and his army pay and allowances :—

Held (Lord Wright dissenting), that, even assuming that a soldier's pay was, for some purposes, "earnings," the reduction in the appellant's income owing to his conscription did not operate to increase the respondents' liability to him, since it was unconnected with the injury for which they were responsible.

The words "which he is earning" in s. 9, sub-s. 3 (i), of the Act refers only to earnings which are, at least in some degree, affected by the workman's incapacity.

Decision of the Court of Appeal [1943] K. B. 145 affirmed.

Appeal from the Court of Appeal.

The facts, stated by VISCOUNT SIMON L.C., were as follows: The appellant was a collier employed by the respondents, and on June 15, 1932, he met with a serious accident in the mine where he was working which broke his pelvis and crushed his back. His average pre-accident wage was 2*l.* 10*s.* 8*d.* He was paid compensation as for total incapacity until 1935. In that year he began work above ground at the screens, and thenceforward, until November 15, 1937, received compensation as for partial incapacity. After November 15, 1937, owing to the increase in wage-rates, his wages at the screens equalled or exceeded his pre-accident wage, and, consequently, compensation ceased. He remained partially incapacitated by the accident, but, in view of the size of his post-accident wages, the weekly payment was nil. On September 30, 1940, when the appellant was earning a wage of 3*l.* 15*s.* 4*d.* at the screens, he was compulsorily called up for service in the army under the National Service (Armed Forces) Act, 1939, and became a gunner in the Royal Artillery. While serving, he drew the usual pay and allowances of a bachelor gunner, and these, together with rations and other advantages, were agreed to amount to 2*l.* 0*s.* 9*d.* a week. He claimed from the respondents, his previous employers, half the difference between this and his pre-accident wage,

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viz., 4*s.* 11½*d.* Judge Temple Morris, sitting in Ammanford county court as an arbitrator under the Workmen's Compensation Acts on the claim for a review, stated that the appellant, if he had been physically fit to work as a collier, "would probably have been 'reserved' and would not have "been called up for service in the army." He found "that "the applicant [the appellant] is still partially incapacitated "for work as the result of the accident. He is now not "physically fit for his pre-accident work as a collier, but he "is fit for any light labouring work, and, in particular, for "work at the colliery screens. If he could undertake light "labouring work he would now be earning an average weekly "wage of 3*l.* 15*s.* 4*d.* The cause of his inability to earn "3*l.* 15*s.* 4*d.* is due, not to any physical incapacity, but solely "to his conscription under the 1939 Act." He held that the appellant was entitled to the amount of the compensation claimed. The Court of Appeal (Mackinnon, Goddard and du Parcq L.JJ.) reversed this decision. The appellant appealed to the House of Lords.

Paull K.C. and *Gerwyn Thomas* for the appellant. When the appellant was called up he was still partially incapacitated, and, therefore, in ascertaining his right to compensation, his army pay cannot be disregarded, for it is the "amount which "he is earning" within s. 9, sub-s. 3 (i), of the Act. Those words are unqualified : *Delta Mill (1919) Ld.* v. *Blackmore* (1). Only in the absence of bona fides or if a man deliberately accepts lower wages than he could earn, can the employer rely on the alternative words "or is able to earn." The meaning of "earnings" was never limited to earnings under a contract : *Norman & Burt* v. *Walder* (2). They are anything which a man is in fact making : *Paterson* v. *A. G. Moore & Co.* (3) and *Calico Printers' Association Ld.* v. *Higham* (4). A soldier is employed and is earning : see s. 80 of the Army Act. In *S.S. Raphael (Owners)* v. *Brandy* (5) the argument that money paid in respect of naval service was not earnings was rejected : see also *Thomson* v. *John Watson Ld.* (6) ; *Port of London Authority* v. *Gray* (7) ; and *Doncaster Amalgamated*

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(1) (1935) 104 L. J. (K. B.) 459, 465.

(2) [1904] 2 K. B. 27.

(3) 1910 S. C. 29 ; 3 B. W. C. C. 541.

(4) [1912] 1 K. B. 93, 102.

(5) [1911] A. C. 413, 414.

(6) 1916 S. C. 23 ; 9 B. W. C. C. 428.

(7) [1919] 1 K. B 65, 68, 70, 74.

Collieries Ld. v. *Leech* (1). There is no principle under which a soldier's pay could be excluded from s. 9, sub-s. 3 (i). The appellant was in fact called up under the National Service (Armed Forces) Act, 1939, but he might have been called up for civil employment under the Defence (General) Regulations, 1939, reg. 58A, and in that case there could have been no doubt that what he received was earnings. In the army he is in no different position. He is earning the most he can earn, and, accordingly, he is entitled to weekly payments of compensation under the Act. Since what he is earning now is arithmetically less than his average weekly earnings before the accident, compensation is automatically due to him under s. 9, sub-s. 3 (i), unless it be established that the amount of his present earnings is not bona fide. When a man is at work you begin with a consideration of what he is actually earning: *Heathcote* v. *Haunchwood Collieries Ld.* (2). The arbitrator rightly found a connexion between the physical incapacity due to the accident and the appellant's army pay and allowances. The appellant would probably have been "reserved" and not subject to conscription if he had not been injured. Moreover, in the army his condition must curtail his chances of normal promotion.

Sellers K.C. and *Carey Evans* for the respondents. The decision in this case must have wide repercussions. Army pay and allowances are not "earnings" within s. 9, sub-s. 3 (i), of the Act: see *Thomson* v. *John Watson Ld.* (3); but, even assuming that they are, they are not the measure of the earning capacity of the appellant who is still "able to earn in some "suitable employment" more than his pre-accident wages. He is only entitled to be compensated for incapacity to earn wages resulting from the injury by accident, not for incapacity resulting from a cause wholly unconnected with that injury, namely, his liability for national service. If the appellant, instead of being called into the army, had met with a motor-car accident and so injured himself that he could only earn 2*l.* 0*s.* 9*d.*, that could not have increased the respondents' liability. Similarly, if he had fallen gravely ill or been sent to prison, he would have been entitled to no compensation, though there would still have been partial incapacity resulting from the accident and he would have been earning nothing.

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(1) [1941] 1 K. B. 649, 654.
(2) [1918] A. C. 52, 56.
(3) 1916 S. C. 23; 9 B. W. C. C. 428.

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There is no connexion between the appellant's loss of earning power and the accident. The diminution is due to a supervening event. One must look at all the circumstances to see whether the earnings of the workman are the true reflection of his capacity to earn. The criterion of his actual earnings can be displaced if it can be shown that they are no true reflection of his earning capacity. Accordingly, regard can be had to his potential earnings. The appellant, so far as physical capacity goes, can earn more than his pre-accident wages, so there is no gap between his pre-accident and his post-accident earning capacity. Though, as a result of his injury, he is partially incapacitated from doing his pre-accident work, he suffers no loss thereby, and so there is no liability on the part of the respondents. It may well happen that an accident may cause a man to change to more remunerative employment than he would otherwise have followed. They referred to *Baggs* v. *London Graving Dock Co., Ld.* (1); *Harwood* v. *Wyken Colliery Co.* (2); *McNally* v. *Furness Withy & Co., Ld.* (3); *Bevan* v. *Nixon's Navigation Co., Ld.* (4); *Archibald Russell, Ld.* v. *Rowatt* (5); and *Doncaster Amalgamated Collieries Ld.* v. *Lumsden* (6); *S.S. Raphael* (*Owners*) v. *Brandy* (7); *Heathcote* v. *Haunchwood Collieries Ld.* (8); and *Delta Mill* (*1919*) *Ld.* v. *Blakemore* (9) are distinguishable.

Carey Evans following. This matter depends on the answer to four questions: (1.) Does the absence of bona fides or the deliberate refusal of the workman to accept more remunerative employment constitute the only circumstances justifying resort to the alternative expressed in the words "or is able to earn," when the man is actually earning? (2.) If there are other circumstances, what is the principle governing resort to this alternative? (3.) What is the justification in the Act for adopting that principle? (4.) Is the conscription of the appellant a circumstance falling within that principle? As to the first question, the limitation suggested was not indicated either in *Delta Mill* (*1919*) *Ld.* v. *Blakemore* (9) or *Heathcote* v. *Haunchwood Collieries Ld.* (8). There must be other

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(1) [1943] K. B. 291.
(2) [1913] 2 K. B. 158, 164.
(3) [1913] 3 K. B. 605.
(4) [1929] A. C. 44.
(5) 1940 S. C. 72, 79, 80; 33 B. W. C. C. Supp. 41, 54, 55.
(6) (1942) 35 B. W. C. C. 128, 132.
(7) [1911] A. C. 413.
(8) [1918] A. C. 52, 56.
(9) 104 L. J. (K. B.) 459.

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circumstances justifying resort to that alternative, e.g., illness, imprisonment, or a bona fide desire to take more stable employment at a lower wage. As to the second question, the principle is that the supervening event justifying resort to the second alternative must be something unconnected with the accident and the injury arising therefrom. As to the third question, the statutory authority is found in s. 1, sub-s. 1, of the Act: see *Hargreave* v. *Haughhead Coal Co., Ld.* (1), and s. 9, sub-s. 1, while s. 9, sub-s. 3, only provides rules for giving effect to the broad principle laid down in sub-s. 1. In sub-s. 3 (i) the words "after the accident" import being conditioned by the accident. As to the fourth question, there is an express finding of fact that the appellant's inability to earn 3*l.* 15*s.* 4*d.* a week is caused solely by his conscription and that so far as his physical capacity goes he would still be able to earn it.

Paull K.C. in reply: Four fundamental fallacies underlie the case for the respondents. (*a*) First the whole argument on their behalf is based on the assumption that the present reduction in the appellant's earnings is wholly unconnected with the partial incapacity resulting from the accident. That is an error of fact, for his present earnings are, at any rate, in some degree affected by the injury. But for it he might have been "reserved" and so exempted from being called up. It is for the respondents to show that his injury is not causing him to earn less in the army than otherwise he might. This is a different case from those in which a workman has suffered a second accident. There is a different principle applied because there are two incapacities. (*b*) Secondly, it is not correct to suppose that a man whose inability to earn higher wages is due to his being called up for service in the forces or in a government factory is any the less entitled to compensation than a man whose inability springs from the condition of the labour market. Both reasons are equally external to the man. Each reason is sufficient to debar him from compensation under the words "or is able to earn" in s. 9, sub-s. 3 (i). Neither reason would debar him under the words of the first alternative. It was decided in *Bevan* v. *Nixon's Navigation Co., Ld.* (2) that conditions in the labour market were external to the workman, and that the measure of his ability to earn did not depend on his chance of getting a job. If the

(1) [1912] A. C. 319, 321.

(2) [1929] A. C. 44.

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respondents' argument were right, *Delta Mill* (*1919*) *Ld.* v. *Blakemore* (1) would have been decided the other way. When a man is, in fact, earning something, the first alternative in s. 9, sub-s. 3 (i), must be applied: see *Harwood* v. *Wyken Colliery Co.* (2). Accordingly, it is improper to consider whether the man's calling up had any connexion with the accident. The fact is that he is partially incapacitated, and the measure of his compensation is only his earnings if he is, in fact, earning. (*c*) Thirdly, it is wrong to draw any parallel between the present case and that of a workman whose failure to earn is due either to his own fault or to some supervening incapacity for work: see *Ball* v. *William Hunt & Sons, Ld.* (3) and *Doncaster Amalgamated Collieries Ld.* v. *Lumsden* (4). There is a distinction between "incapacity for work" and "incapacity to work": per Lord Macnaghten in *Ball's Case* (5). A man such as the appellant directed into Woolwich Arsenal would not be deprived of his compensation. The only distinction between the appellant and such a man would be that one was making the gun and the other firing it. (*d*) Finally, it is not correct to say that there has been no change of circumstances in the present case, entitling the appellant to claim a review. Any difference in the actual position of the man is sufficient: see *Delta Mill* (*1919*) *Ld.* v. *Blakemore* (1) and *Englefield Collieries Ld.* v. *Roberts* (6).

The House took time for consideration.

Dec. 7. VISCOUNT SIMON L.C. My Lords, the appellant attempted to argue that conscription would probably not have been applied to him if he had not been injured in 1932, but this is a speculation into which it is impossible to enter with confidence, and we must take it that the application of conscription to the appellant was a supervening event which further limited his income, but which is not proved to be causally connected with the original accident. The question, therefore, is whether a supervening event of this kind operates to increase the respondents' liability to the appellant.

If I understood Mr. Paull's argument rightly, he did not dispute that, if a partially incapacitated workman meets with a second accident, say, a traffic accident or an illness, with which the employers have nothing to do, and thereby is further reduced in earning capacity (or even totally incapacitated), this supervening event does not increase the liability of his employers. At any rate, that is plainly so. The employer in such a case may continue to be liable for the partial incapacity due to the original accident, but the supervening event is not connected with the original accident at all: see the decision of this House in *McCann* v. *Scottish Co-operative Laundry Association Ld.* (1), and compare *Pedley* v. *J. Davison & Son Ld.* (2). The same principle applies here. Compensation, under s. 9 of the Act of 1925, is compensation "where total or partial incapacity for work results from the "injury," and is measured by the use of a comparison of average weekly earnings before the accident with "the average "weekly amount which he is earning or is able to earn in some "suitable employment or business after the accident." Even assuming that a soldier's pay is for some purposes "earnings" (as under s. 10 of the Act: see *S.S. Raphael* (*Owners*) v. *Brandy* (3)), a reduction in an injured workman's income owing to conscription cannot be laid to the charge of his former employer, for it is unconnected with the injury for which the employer is responsible. I agree with du Parcq L.J.'s observation (4) that the words "which he is earning" in s. 9, sub-s. 3 (i) of the Act refer only to earnings which are, at least in some degree, affected by the workman's incapacity. "It follows," said the Lord Justice, "that, as a general rule, a man whose "earnings are reduced because he has been called up for "service in His Majesty's Army cannot properly claim that "his soldier's pay and allowances shall be treated as his "earnings for the purposes of the sub-section. They represent "a figure which is wholly irrelevant to the calculation thereby "prescribed. The reduction in his income is due, not to his "incapacity, but to the fact that the legislature has made "him (in common with all other young men) liable for military "duty." I move that this appeal be dismissed with costs.

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(1) 104 L. J. (K. B.) 459.
(2) [1913] 2 K. B. 158.
(3) [1912] A. C. 496.
(4) 35 B. W. C. C. 128.
(5) [1912] A. C. 496, 500.
(6) (1932) 25 B. W. C. C. 558.

LORD THANKERTON. My Lords, it is clear that, on June 15, 1932, in the employment of the respondents, personal injury by accident arising out of and in course of the employment was caused to the appellant, and that the respondents are

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(1) (1936) 105 L. J. (P. C.) 58.
(2) (1937) 30 B. W. C. C. 323.
(3) [1911] A. C. 413.
(4) [1943] K. B. 145, 151.

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liable to pay compensation to the appellant provided that he can justify a claim for a weekly payment calculated in accordance with the rules in ss. 9 and 10. It is also clear that immediately before his conscription on September 30, 1930, he was still suffering from partial incapacity resulting from the injury, but as the wage he was earning at the screens exceeded his pre-accident wage of 2*l.* 10*s.* 8*d.* as a coal miner, there was no room for compensation. Then came the conscription, on September 30, 1940, and a reduction in earnings to the amount of 2*l.* 0*s.* 9*d.* instead of the average weekly wage of 3*l.* 15*s.* 9*d.* which he was then earning at the screens. Hence arises the appellant's present application for an increase in the rate of his weekly compensation as from the date of the conscription. The learned arbitrator states : " I find that the " applicant is still partially incapacitated for work as the " result of the accident. He is now not physically fit for his " pre-accident work as a collier, but he is fit for any light " labouring work, and in particular for work at the colliery " screens. If he could undertake light labouring work he " would now be earning an average weekly wage of 3*l.* 15*s.* 4*d.* " The cause of his inability to earn 3*l.* 15*s.* 4*d.* is due not to " any physical incapacity but solely to his conscription under " the 1939 Act." In face of these definite findings, it seems to me impossible for the appellant's counsel to maintain, as he sought to do, that other passages in the judgment suggest some connexion between the physical incapacity due to the accident and the amount of the army pay and allowances which he is earning.

My Lords, it is important to remember that s. 9 throughout provides for ascertainment of the amount of compensation in respect of total or partial incapacity for work which results from the injury defined in s. 1, which is caused in a particular employment, rendering the employers in that employment liable to pay compensation. Sub-s. 3, if fully expressed, prescribes rules for calculating the weekly payment in the case of partial incapacity resulting from the injury, and these words govern the whole of the subsection. Secondly, under s. 9, the amount of the weekly payment is ascertained on a wage-earning basis. In sub-s. 2, the weekly payment in the case of total incapacity is based on the workman's pre-accident earnings. In sub-s. 3, the weekly payment in the case of partial incapacity is based on the difference between two figures, viz., his pre-accident earnings and the earning ability

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which remains to the partially incapacitated workman. If he is, in fact, earning an average weekly wage, that figure is to be taken, unless, through the workman's slackness in seeking employment appropriate to his partially injured state which would afford higher earnings, or some similar cause, his actual earnings do not provide a valid test. In that case, or where he is not, in fact, earning, recourse is to be had to what he is able to earn. This was dealt with in *Heathcote* v. *Haunchwood Collieries Ld.* (1) and *Delta Mill (1919) Ld.* v. *Blakemore* (2), but, in my opinion, they do not affect the present question, for I have no doubt that the appellant's army pay and allowances are earnings within the meaning of sub-s. 3 (i) of s. 9, and there can be no question that they represent a genuine test of his present earning capacity. The decision of this House in *S.S. Raphael (Owners)* v, *Brandy* (3), appears to me to cover the former point.

It follows that there exists, as the learned arrbitrator has found, a reduction from the pre-accident figure of 2*l.* 10*s.* 8*d.* to 2*l.* 0*s.* 9*d.*, which is his present wage-earning capacity, the difference amounting to 9*s.* 11*d.*, but it is clear that this reduction does not result from the injury, for the arbitrator has so found, and I am unable to see that it is relevant against the particular employer whose liability is limited to the results of the injury caused in his employment. As MacKinnon L.J. says (4): "His claim is not based on any continuing "result of the injury or on incapacity resulting therefrom," or, as du Parcq L.J. puts it (5): "The reduction in his income "is due, not to his incapacity, but to the fact that the "legislature has made him (in common with all other young "men) liable for military duty." I am unable to distinguish this case from, for instance, the case of the workman sustaining injury from two successive accidents, the first of which leaves him subject to partial incapacity for work, and the second of which increases the partial incapacity. The wage which he may be, in fact, earning after the second accident would be accepted as the amount of his earnings, but there would necessarily remain an inquiry with a view to allocating the parts of the total reduction which resulted respectively from the injury caused in each accident, so as to ascertain the compensation due by the particular employer against whom the claim was made. Similarly, if the second accident rendered the

(1) [1918] A. C. 52.

(2) 104 L. J. (K. B.) 459.

(3) [1911] A. C. 413.

(4) [1943] K. B. 145, 149.

(5) Ibid. 151.

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workman totally incapacitated, the first employer would only be liable as for partial incapacity, and not as for total incapacity. The same conclusion appears to me to follow if the cause of the second reduction is not a second injury by accident within the Workmen's Compensation Act, but a cause entirely unconnected with the first injury by accident. The case of a workman who unreasonably refuses to undergo an operation or medical treatment may also be said to be analogous. " As Fletcher Moulton L.J. put it in *Warncken* " v. *R. Moreland & Son, Ld.* (1), ' a workman must behave " ' reasonably, and if the incapacity, or the continuance of the " ' incapacity after a certain time, is due to the fact that he " ' has not behaved reasonably, then the continuing in-" ' capacity is not a consequence of the accident, but " ' a consequence of his own unreasonableness.' This view of " the matter has been recognized by this House in *Fife Coal* " *Co.* v. *Cant* (2), and in *Fyfe* v. *Fife Coal Co., Ld.* (3), as well " as in many cases in the Court of Appeal in England and in " the Court of Session in Scotland " : per Viscount Simon L.C., in *Steele* v. *Robert George & Co.* (*1937*) *Ld.* (4) I agree with the motion proposed by the noble and learned Lord on the woolsack.

LORD RUSSELL OF KILLOWEN. My Lords, the basis of the judgments of MacKinnon and Goddard L.JJ. must be taken as unsound, in view of the decision of this House in the case of *S.S. Raphael* (*Owners*) v. *Brandy* (5). That authority (which was not cited in the Court of Appeal) disposes, in my opinion, of the somewhat startling contention that a man in the employ of the Crown does not " earn " his pay. There remain for consideration the reasons for the judgment of du Parcq L.J., and the construction which he placed on the first rule in s. 9, sub-s. 3 of the Act. The learned lord justice held that on the true construction of that rule, before " the average weekly " amount which he is earning " (which I will hereafter refer to as the reduced earnings) can be taken as the factor which is to be deducted from " the amount of the average weekly " earnings of the workman before the accident," some link or nexus must be shown to connect the reduction in earnings with the accident, otherwise the workman would be receiving

(1) [1909] 1 K. B. 184, 189.
(2) 1921 S. C. (H. L.) 15.
(3) 1927 S. C. (H. L.) 103.
(4) [1942] A. C. 497, 499.
(5) [1911] A. C. 413.

compensation for something which did not result from the injury. In other words, if the reduction has been brought about by some cause which is unconnected with the workman's injury, it is irrelevant to the purpose of the section, its purpose being to provide a method of calculating an amount of compensation for incapacity for work resulting from the injury. In such circumstances the second branch of the first rule, and not the first must come into play.

My Lords, I agree with this view. The object of the Act (in cases of non-fatal accidents) is to compensate the workman for his loss of earning power. Section 9 gives the rules for calculating the amount of that compensation where the loss is only partial, but the only compensation which has to be calculated under those rules is compensation for incapacity for work which results from "the injury," i.e. the injury which, under s. 1, has rendered the employer liable to pay compensation. In my opinion, if the calculation is to accord in its result with the object of the Act, it must be permissible, in applying the first rule, when a workman who is actually earning a wage applies for a review, to inquire into all the circumstances in order to ascertain whether the reduced earnings constitute a factor which is proper to be taken into account for the purpose of making the calculation which the rule prescribes. If on inquiry it turns out that the reduction is not caused by an increase of incapacity for work resulting from the injury, then the reduced earnings cannot be a factor proper to take into account. In the present case the difference between the appellant's army pay and what he was earning at the time of his conscription is in no way due to any decrease of earning power on his part or connected with the injury for which the employers are liable to pay compensation. The second branch of the first rule, accordingly, applies, and, since his pre-conscription average weekly earnings exceeded his pre-accident average weekly earnings, his application for a review and increase must fail.

For the reasons which I have indicated I agree with the order of the Court of Appeal, and would dismiss this appeal.

LORD MACMILLAN. My Lords, your Lordships have before you an application by the appellant for review of the compensation payable to him under the Workmen's Compensation Act, 1925. It is enough for my purpose to emphasize the cardinal points (1.) that the appellant, who is still partially incapacitated for work as the result of his accident, was, when called up for military service, in receipt of average weekly earnings in excess of his pre-accident wages, and was, consequently, not receiving any weekly compensation, and (2.) that the pay which the appellant is receiving in the army is less than his pre-accident wages. He claims to be entitled to half the difference between his army pay of 2*l.* 0*s.* 9*d.* and his pre-accident wages of 2*l.* 10*s.* 8*d.*, viz., 4*s.* 11½d., and this the learned arbitrator awarded him, but the Court of Appeal has set aside the award.

In my opinion, the judgment of the Court of Appeal is right. To justify an application by a workman for review of his compensation he must establish that there has been some change of circumstances, but not every change of circumstances to his detriment will justify review. The change must be relevant to his capacity or ability to earn wages, to his earning power, as affected by his accident and its consequences. Here the arbitrator finds, in fact, that the present inability of the appellant to earn more than his pre-accident wages is " due not to any physical incapacity but " solely to his conscription " and that the appellant is still able to earn more than his pre-accident wages.

For the purpose of calculating the compensation payable in cases of partial incapacity s. 9, sub-s. 3, of the Act directs a comparison to be made between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning after the accident. The appellant submits that, if the latter figure is arithmetically less than the former figure, compensation automatically becomes due unless the latter figure can be challenged as not bona fide. I cannot accept this reading. The partial incapacity which justifies an award of compensation must, in the words of s. 9, sub-s. 1, be partial incapacity for work resulting from the injury. So far as the appellant's partial incapacity for work resulting from his injury is concerned, there has been no change of circumstances since his compensation was suspended in consequence of his earning more than his pre-accident wages. The conscription of the appellant has in no way affected his wage-earning capacity. It is a circumstance wholly extrinsic to his injury for which neither he nor the respondents have any responsibility. If a second accident entirely unconnected with his employment had befallen the appellant and resulted in a diminution of his weekly earnings below his wages before his first accident, it is plain that the respondents would be under no liability to compensate him for the difference between his wages before his first accident and his wages after his second accident. It is the same with the appellant's conscription. It would certainly be a remarkable result of the Act if it required an employer to compensate his workman for the consequences, not of something resulting from an injury sustained in the employment, but of the workman being called up for military service. The Act gives compensation for personal injury by accident. Conscription is not a personal injury by accident. I am accordingly for affirming the judgment of the Court of Appeal.

LORD WRIGHT. My Lords, This case raises no question as to the appellant's right to compensation under s. 1 of the Workmen's Compensation Act, 1925. The only question is as to the scale of compensation. These are different questions, as explained by Lord Macnaghten in *Ball* v. *William Hunt & Sons Ld.*, (1), and Lord Dunedin in *Portland Colliery Co., Ld.* v. *Murray* (2).

The issue depends on whether the appellant's pay and allowances as a soldier called up for service in the army under the National Service (Armed Forces) Act, 1939, are earnings which are to be taken into account for computing the weekly payments of compensation. He claims that they are, and that he falls within the precise terms of the Workmen's Compensation Act, 1925. Personal injury has been caused to him by the accident arising out of and in the course of his employment, which has caused him partial incapacity for work. That still continues. He is entitled to compensation in accordance with the provisions of the Act contained in s. 9, sub-s. 3 (i.), which provides that, where partial incapacity for work results from the injury, the compensation shall be a weekly payment during the incapacity, which is to be "one-half the difference between the amount of the average "weekly earnings of the workman before the accident and the "average weekly amount which he is earning . . . . after the "accident." I disregard the words "or is able to earn in "some suitable employment or business," because as this House has held in *Delta Mill (1919), Ld.* v. *Blakemore* (3), these words state a second alternative which is only to come into consideration in the absence of actual earnings. The appellant's partial incapacity to earn, which reduced his earning capacity from that of a collier to that of a worker only capable of light jobs, was produced once for all by the injury. That fixed his right. It still continues, and the only problem is to ascertain the measure of the compensation.

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(1) [1912] A. C. 496, 500.
(2) [1923] A. C. 566, 575.
(3) 104 L. J. (K. B.) 459.

His average pre-accident weekly earnings have been fixed once for all. The amount of the compensation (if any) must vary from time to time according as his weekly post-accident earnings are equal to or greater or less than his pre-accident earnings. If equal, no compensation will be claimable because there is no difference at all. If greater there will also be no compensation because there is no difference to the detriment of the workman. If less, then the minus difference will give the measure of the weekly payment. The Act fixes an arbitrary arithmetical measure depending on actual fact and varying with the facts. Where the weekly payment ceases to be exigible because the workman is earning as much as or more than his pre-accident earnings, the liability, which continues as long as the incapacity, is kept alive by a declaration of liability to cover the period when no compensation is actually due. The Act of 1925 changed the law in the respect that under the Act of 1906 there was no hard and fast formula like the difference between pre-accident and post-accident earnings. The arbitrator under the Act of 1906 had a discretion: see sch. I, para. 3. The weekly payment was to " bear such relation to the amount of that difference " [sc. between pre-accident and post-accident earnings] " as " under the circumstances of the case may appear proper." This change in the law, which restored on that point the rule embodied in the Workmen's Compensation Act, 1897, must be remembered in considering some of the decisions under the Act of 1906. The result may sometimes seem arbitrary and not affording any true equation between the loss and the compensation, but it must be remembered that the remedies under the Workmen's Compensation Act are dissimilar from what the common law would give in an action for damages. This is explained by Buckley L.J. and Hamilton L.J. in *Harwood* v. *Wyken Colliery Co.* (1).

Actual earnings may be affected (increased or reduced) by causes other than the continuing partial incapacity. The injured man, though incapacitated to do his former work,

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(1) [1913] 2 K. B. 158.

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may exercise a gainful activity outside the sphere of the employment in which he was injured. The collier may earn money as a shop assistant, a clerk, a bookmaker, a commercial traveller, or in a myriad other possible ways in which he is not incapacitated by his injury, however permanent its effects may be. His earnings for better or worse may be affected by all sorts of contingencies peculiar to the particular activity which the man was at the time pursuing. These contingencies may have no relation to the man's original employment or to the direct consequences of the accident. Their only materiality is their effect on the post-accident earnings. An early illustration of this principle is to be found in *Norman & Burt* v. *Walder* (1), where the workman had been partially incapacitated by injury arising out of and in the course of his employment by a firm of builders and contractors. After the accident he started a small bakery business with the help of his wife and son and daughter. The Court of Appeal held, reversing the county court judge, that "earnings" under the Act could not be limited to money earned in the employment of a master, though such earnings are not the same as the profits of the business. So far as I know, that decision has never been questioned. Such earnings do not affect the right, but merely go to reduce the amount of compensation to which the man is entitled. For that reason it has been held that the amount of the man's compensation is reducible on the ground that he has not availed himself of reasonable opportunities or has disabled himself by conduct which has prevented or diminished his post-accident earnings, as where he unjustifiably refuses to work.

The second alternative, "ability to earn," it is now clear, only refers to physical capacity. So the House of Lords held in *Bevan* v. *Nixon's Navigation Co., Ld.* (2), following the decision of the Court of Appeal to the same effect in *Cardiff Corporation* v. *Hall* (3). The Lords were divided. Viscount Dunedin, who had in effect the casting vote, confessed (4) that if, in 1912 or 1913, he had had to sit on appeal against the *Cardiff* Case (3), he would find it hard to say what his opinion would have been, but he was influenced (5) by the fact that the *Cardiff* Case (3) had ruled the practice ever since, and also by the fact that the legislature had passed a measure in 1923, repeated in the Act of 1925 and now in force in an amended form in an Act of 1931. The measure provided the conditions under which a partially incapacitated workman could be treated as totally incapacitated, but, as the question raised in this appeal relates to the first alternative and the test is the test of actual earnings, not estimated ability to earn, I merely refer to these authorities for purposes of distinction. It certainly seems anomalous that the test of physical capacity to earn should have been accepted in the second alternative under s. 9, sub-s. 3, when it did not apply in the first alternative. In the first alternative, the physical condition of the partially incapacitated man is at least for the time a constant factor, whereas his actual earnings may vary by reason of other factors, such for example as changes in rates of wages, chances of gainful employment or activity, badness or goodness of trade, which may change from time to time: *Portland Colliery Co., Ld.* v. *Murray* (1). The first alternative, however, depends on the man having actual earnings in what I may describe as the substituted pursuit or occupation, which is a sort of salvage, for the benefit of the employer, so long as the man is " earning " at all. Can, then, it must be asked, the appellant's army pay and allowances be regarded as earnings for the purpose of the Act? That they may be so regarded has been, in my opinion, decided by this House in *S.S. Raphael* (*Owners*) v. *Brandy* (2). This ruling was applied by the Court of Appeal in *Port of London Authority* v. *Gray* (3), where it was held that a partially incapacitated workman, who during the last war had been called up on military service, he having previously voluntarily attested under Lord Derby's scheme, must bring into account, for the benefit of the employers and in reduction of the weekly payment, his army pay and allowances. They were earnings within the meaning of the Act. This decision has not been, so far as I know, doubted, and has been followed in the course of the present war by the Court of Appeal in *Doncaster Amalgamated Collieries* v. *Leech* (4).

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(1) [1904] 2 K. B. 27.
(2) [1929] A. C. 44.
(3) [1911] 1 K. B. 1009.
(4) [1929] A. C. 44, 52.
(5) Ibid. 51, 52.

These last two authorities do not bind this House, but in principle, as I think, are right and cover the present case, unless they can be distinguished on the ground that they were cases of voluntary enlistment, whereas the present case is one of compulsory service under the Act of 1939. But whatever

(1) [1923] A. C. 566.
(2) [1911] A. C. 413.
(3) [1919] 1 K. B. 65.
(4) [1941] 1 K. B. 649.

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differences may be involved in that distinction, I cannot see how it can affect the question whether or not the army gains are earnings for the purposes of the Act. It is true that in *Port of London Authority* v. *Gray* (1), the case of a man compulsorily serving was expressly reserved by Duke L.J., but the Lord Justice did not consider whether it could make any practical difference in a question like the present. Swinfen Eady M.R. did not mention the point, but he quoted (2) the language of the sheriff substitute in *Thomson* v. *John Watson, Ld.* (3), that the man, by enlisting, had made it impossible for the employers to assess the extent to which he was disabled in respect of the industrial disease from earning full wages at his work. The Court of Appeal reversed the decision of the county court judge. So far as it goes, the case of a man compulsorily serving would be a stronger case in favour of the man, in that the element of choice by the man would be absent.

The instance of a second physical disability by a second accident or industrial disease supervening on a former injury which has caused partial incapacity has been discussed in several cases. That, however, is, in my opinion, one of a class of cases which throw no light on the present case, where there is no second accident giving new right to compensation, where the original physical disability remains unaltered, and the only question is whether there are any earnings, and, if so, what earnings to be brought into account in reduction of the weekly payments. As to the case of two actual physical accidents, the rule which has been applied by the Court of Appeal is stated by Slesser L.J. in *Evans* v. *Oakdale Navigation Collieries, Ld.* (No. 2) (4), to be that where " a claim is made as regards a " second accident while incapacity still exists from a former one, " the compensation for the later accident can only be that " proportion of incapacity on which the second accident can " operate." He cited *Harwood* v. *Wyken Colliery Co.* (5), *Thompson* v. *London & North Eastern Ry. Co.* (6). Here, however, there is no second accident. Conscription cannot be regarded, in my opinion, as a second accident. It merely affects the actual earnings which give the basis of computation of the weekly payments in respect of the right already existing.

The amount involved here may seem very trifling, but it

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(1) [1919] 1 K. B. 65, 76.
(2) Ibid. 72.
(3) 1916 S. C. 23, 24.
(4) [1940] 1 K. B. 702.
(5) [1913] 2 K. B. 158.
(6) [1935] 2 K. B. 90.

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does not follow that it is so very trifling to the workman, and, as counsel for the respondents observed, the decision given in this case will have wide repercussions. In my opinion, the appellant is earning in his army employment 2*l.* 0*s.* 9*d.* a week, which, if set against his pre-accident weekly earnings of 2*l.* 10*s.* 8*d.*, would give a difference of 9*s.* 11*d.*, fifty per cent. of which is 4*s.* 11½*d.* This is what, as I read the Act, he is entitled in all the facts to have. It is true that, if he had not been called up, he would have been getting, partially incapacitated as he was, average weekly earnings of 3*l.* 15*s.* 4*d.* He cannot earn that now, but he should, in my opinion, get a weekly payment based upon the gainful use he can make of his actual earning capacity. He may as a patriot be content with the comparatively small earnings of a soldier, but, in my opinion, it would be hard if in addition he lost the exiguous weekly payments to which he is entitled under the Act. For myself, I would allow the appeal and restore the award of the county court judge.

Appeal dismissed.

Solicitors for appellant : *John T. Lewis & Woods for Randell, Saunders & Randell, Swansea.*

Solicitors for respondents : *Botterell & Roche for Llewellyn & Hann, Cardiff.*

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Oct. 19 ; *Dec.* 7.

M'MAHON . . . . APPELLANT ;

AND

DAVID LAWSON, LIMITED . . . . RESPONDENTS.

Workman's compensation — Assessment — Concurrent employment — Injury while working for one employer—Workman son of second employer residing in his house—Earnings to be taken into account—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 3, *sub-s.* 2 (*e*), *s.* 10 (ii.).

By s. 3 of the Workmen's Compensation Act, 1925 : " (1.) In " this Act, unless the contract otherwise requires, the expression " ' workman,' subject to the exceptions hereinafter mentioned, " means any person who has entered into or works under a contract " of service . . . . with an employer, whether by way of manual

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* *Present :* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD WRIGHT.

"labour, clerical work or otherwise . . . . (2.) The following "persons are excepted from the definition of workman, that is to "say . . . . (e.) a member of the employer's family dwelling in "his house . . . ."

By s. 10: "For the purposes of the provisions of this Act "relating to 'earnings' and 'average weekly earnings' of a "workman, the following rules shall be observed:— . . . . "(ii.) Where the workman had entered into concurrent contracts "of service with two or more employers under which he worked "at one time for one such employer and at another time for "another such employer, his average weekly earnings shall be "computed as if his earnings under all such contracts were "earnings in the employment of the employer for whom he was "working at the time of the accident . . . ."

The appellant, who was injured by accident arising out of and in the course of his employment with the respondent, was also employed under a concurrent contract of service with his father in whose house he lived:—

Held, that s. 3, sub-s. 1 (*e*), of the Act did not operate to prevent the appellant's earnings under his contract with his father being taken into account, in accordance with s. 10 (ii.), in computing his average weekly earnings.

S.S. Raphael (*Owners*) v. *Brandy* [1911] A. C. 413 followed.

Decision of the Court of Session, 1943, S. C. 12, reversed.

APPEAL from the First Division of the Court of Session.

On January 17, 1942, the appellant was injured by accident arising out of and in the course of his employment with the respondents, in which he earned an average weekly wage of 18*s*. as a part-time omnibus driver. On April 22, 1942, he started arbitration proceedings under the Workmen's Compensation Act, 1925, in the sheriff court of Lanarkshire. In his averments he set out (inter alia) that before the accident he was also serving under a concurrent contract of service with his father at an average weekly wage of 2*l*. 10*s*. 0*d*. plus board and lodgings estimated at 1*l*. 5*s*. 0*d*. a week, and that the respondents were only willing to pay him compensation at the rate of 15*s*. 9*d*. a week which was inadequate. The respondents, in their answers, denied the existence of this contract of service, and averred that any sums paid to the appellant by his father did not fall to be computed in assessing the compensation to which he might be entitled and that the sum of 15*s*. 9*d*. a week was the total sum of compensation due to him. The appellant pleaded that an award as craved should be granted. The respondents pleaded (inter alia) that (1.) the action as laid was incompetent and irrelevant and should be dismissed; (2.) the respondents having tendered the appellant the compensation to which he was entitled, the action was premature and unnecessary and should be dismissed; and (3.) that the appellant not being engaged in a concurrent contract of service with other employers in terms of the Workmen's Compensation Acts, the only earnings falling to be taken into account in assessing the compensation due to him were those paid by the respondents. It was stated on behalf of the appellant that he was at the relevant time dwelling in the house of his father. The sheriff-substitute, sitting as arbitrator, sustained the second and third pleas-in-law for the respondents and awarded compensation at the rate of 15*s.* 9*d.* a week. On July 31, 1942, he stated a case for the Court of Session, setting out the pleadings in the original application for arbitration and certain of the pleas-in-law. He stated three questions of law for the opinion of the court: "(1.) On the "foregoing facts and on the said admission for the . . . . "appellant, was I entitled to hold that his average weekly "earnings were not to be computed as if his earnings under "his contract with his father were earnings in the employment "of the respondents? (2.) . . . . was I entitled to sustain the "second plea-in-law for the respondent? (3.) . . . . was "I entitled to sustain the third plea-in-law for the respon-"dents?" The First Division of the Court of Session answered the first question in the affirmative and found it unnecessary to answer the other two. The appellant appealed to the House of Lords.

James Walker and *George Reid* (both of the Scottish Bar) for the appellant. The appellant satisfied the description "the workman" in s. 10 (ii.) of the Act and had entered into a concurrent contract of service with two employers, for he was entitled to regard his employment by his father as a concurrent contract of service. Nothing in s. 10 itself can be taken to cut down his right to compensation to an amount calculated on the basis of the remuneration of the employment in which he was injured. In s. 10 (ii.) there is no qualification of the contracts of service and no definition of "employer." Section 3, which contains the definition of "workman," and s. 10 are under different headings, the former being under "Right to Compensation" (ss. 1 to 7) and the latter being under "Amount of Compensation" (ss. 8 to 13).

Blades K.C. and *Calver* (both of the Scottish Bar) for the respondents. The appellant was a member of his father's family dwelling in his house and so is excluded from the definition of " workman " in s. 3, sub-s. 2 (*e*). Where there is no workman, there can be no contract of service within s. 10 (ii.), and so the appellant was not employed in " concurrent " contracts of service." His earnings in his father's employment are, accordingly, to be excluded from computation. The fact that the sections are under different headings does not affect the matter. Nothing in the context of s. 10 (ii.) requires " workman " to have any different meaning from that provided by the definition in s. 3. It deals only with contests between a workman within the meaning of the Act and an employer within the meaning of the Act.

The House took time for consideration.

Dec. 7. VISCOUNT SIMON L.C. My Lords, the appellant met with an accident arising out of and in the course of his part-time employment by the respondents, and is admittedly entitled, under the Workmen's Compensation Act, 1925, to a weekly payment from them during his incapacity resulting from this injury. The only question now to be decided is whether the amount of that weekly payment is to be arrived at by reference solely to what he was earning from the respondents (which was 18*s*. a week) or whether his average weekly earnings are to be computed by including also what he was earning under another contemporary part-time contract of service entered into with his father in whose house he was living. This latter employment would not constitute him a " workman " under the Act of 1925 : see s. 3, sub-s. 2 (*e*) ; and, consequently, if the appellant had met with an accident while serving his father, the statute would give him no compensation on that account, but it still remains to construe and apply s. 10 (ii.) of the Act, which runs as follows :— " Where the workman had entered into concurrent contracts " of service with two or more employers under which he " worked at one time for one such employer and at another " time for another such employer, his average weekly earnings " shall be computed as if his earnings under all such contracts " were earnings in the employment of the employer for whom " he was working at the time of the accident."

The question is whether the appellant is a " workman " who has " entered into concurrent contracts of service " with two employers, when, as regards one of the two contracts of

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service, he is not a "workman" within the meaning of the Act. Lord Moncrieff, when delivering the leading opinion in the First Division of the Court of Session, put the question thus (1): "Can one who, being admittedly a workman, sues "an employer for compensation, refer to earnings drawn by "him from another employer in whose service he was not "a workman?" The Inner House, confirming the view of the sheriff-substitute, unanimously answered this question in the negative. There is, undoubtedly, a powerful argument to be advanced for this view, and the correct answer might well be regarded as doubtful, were it not that the exact question of construction has already been the subject of decision by this House—a circumstance which escaped the notice of everybody until after the arguments in the present appeal were concluded. In *S.S. Raphael* (*Owners*) v. *Brandy* (2) the injured workman was a stoker serving on board a merchant ship, but he was also a Royal Naval Reserve stoker, in which character he received an annual retaining fee of 6*l.* This retaining fee was held by the House of Lords to be "earnings" under a "concurrent contract" of naval service with the Crown, and it was further decided that it had to be taken into account in calculating the stoker's average weekly earnings, notwithstanding that the Act does not apply to persons in the naval service of the Crown: s. 9, sub-s. 1, of the Act of 1906, now s. 33, sub-s. 1, of the Act of 1925. What is particularly striking is that, while the decision in this House was unanimous, in the English Court of Appeal (3) the rival constructions were set out with emphasis and clearness in the judgment of Fletcher Moulton L.J. (with whom Cozens-Hardy M.R. agreed), and in the dissenting judgment of Farwell L.J. respectively. My noble and learned friend Lord Thankerton has, in the opinion which he is about to read, extracted the essential passages, so I need not reproduce them here. The consequence is that it is beyond dispute that in *S.S. Raphael* (*Owners*) v. *Brandy* (2) this House, with these contrasted views before it, deliberately adopted that for which the present appellant contends. It follows that the three questions of law appended to the stated case should be answered in the negative. The appeal must, therefore, be allowed with costs here and below.

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(1) 1 43 S. C. 12, 16.
(2) [1911] A. C. 413.
(3) [1911] 1 K. B. 376.

LORD THANKERTON. My Lords, the facts of this case have been sufficiently stated by my noble and learned friend, who has also stated the short question raised on the construction of the second rule prescribed in s. 10 of the Act for the purposes of the provisions of the Act relating to "earnings" and "average weekly earnings" of a workman.

Since the hearing of this appeal was concluded—in common with your Lordships—my attention has been drawn to the decision of this House in *S.S. Raphael (Owners)* v. *Brandy* (1), which clearly settled the question of construction raised in the present appeal. I regret that the attention of the courts below was not called to this decision. This House unanimously affirmed the decision of the Court of Appeal (2), and the opinion of Fletcher Moulton L.J., who, along with Cozens-Hardy M.R., formed the majority, on the question of construction raised in the present appeal was approved in this House, while the dissenting opinion of Farwell L.J. was rejected. The injured workman, a stoker on board a merchant ship, was also a Royal Naval Reserve stoker, in respect of which he received an annual retaining fee of 6*l.* After holding that the 6*l.* was earnings under a contract of service with the Crown, and having in view the exception of persons in the naval or military services of the Crown under s. 9, sub-s. 1, of the Act of 1906—re-enacted almost verbatim as s. 33, sub-s. 1, of the Act of 1925—Fletcher Moulton L.J. proceeded to deal with the provision as to concurrent contracts contained in sch. I, para. 2 (*b*) to the Act of 1906—re-enacted verbatim as s. 10 (ii.) of the Act of 1925, as follows (3): "This being so, "the claim is rightly made, and the only question is whether "the contract of service with the Crown comes within the "provision as to concurrent contracts which is found in "sch. I, para. 2 (*b*), which relates to concurrent contracts of "service. Now there is nothing whatever in the Act to say "that a contract of service with the Crown is not a contract "of service. It is perfectly true that the employer is in such "a case shielded from claims under such contract of service, "but that is in these contracts the personal privilege of the "Crown and does not arise from the contract with the Crown "being declared by the Act not to be a contract of service at "all. The language of sch. I, para. 2 (*b*), is perfectly general. "The contracts of service therein referred to are not restricted

(1) [1911] A. C. 413.
(2) [1911] 1 K. B. 376.
(3) [1911] 1 K. B. 383.

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" to contracts of service under which the employer is liable to " claims under the Act. Not only is this true with regard " to the language of the paragraph, but it is also necessitated " by the evident aim and object of the paragraph. It is " intended to enable the tribunal to arrive at a proper estimate " of the average weekly earnings of the workman for the " purpose of measuring the compensation under a contract of " service under which an employer is liable." Contrast this with the opinion of Farwell L.J., viz. (1) :—" I am of opinion " that the effect of s. 9 is to exclude the Crown and persons in " the naval or military services of the Crown from the operation " of the Act, and that s. 13 must accordingly be read as if the " words 'other than the Crown' were written into the " definition of 'employer'" (now s. 5 of the Act of 1925) " and " the words 'other than persons in the naval or military " 'services of the Crown' were written into the definition of " 'workman'" (now s. 3 of the Act of 1925). " Turning next " to sch. I, para. 2, it seems obvious to me that the 'workman' " and 'employer' therein mentioned are the only workmen " or employers to whom the Act applies, and that cl. (*b*) " cannot be read so as to give two different meanings to the " words 'employer' and 'workman' according to the circumstance whether the accident happened while he was in " the service of the Crown or of the employer. It is clear that " if the accident happened while he was in the service of the " Crown he would get no compensation under the Act at all " because he is not a workman nor is the Crown an employer " within the meaning of the Act. I fail to see how I can treat " Crown and workman as within the Act when the workman " is in the employment of another person. Two conditions " have to be fulfilled before cl. (*b*) has any application. If " they are stated in two sentences instead of one, the matter " becomes clear : 'If a man being a workman within the Act " 'has entered into a contract of service with an employer " 'within the Act under which he worked at one time for such " 'employer, and the same man being a workman within the " 'Act has entered into another contract with an employer " 'within the Act under which he worked at another " 'time for such second employer, the two contracts being " 'concurrent.' Under these words no question arises, and " I can see no ground on which the meaning of the words " 'workman' and 'employer' can be varied in such a case

(1) [1911] 1 K. B. 384.

" so as to make ' employer ' include the Crown in one but not " in the other and ' workman ' include a man in the naval or " military services of the Crown in one case but not in the " other."

These contrasted views and their reception in this House appear to me to demonstrate that the question of construction in this appeal cannot be differentiated from the question of construction which was considered and decided by this House in 1911, and, though the view of Farwell L.J. commands my sympathy, the importance of continuity of decision in statutory construction constrains my adherence to the earlier decision of this House.

I would like to associate myself with Lord Moncrieff's criticisms (1), on the form of the stated case. There is another point to which I would like to advert. This case has been decided on relevancy before the arbitrator and in the Court of Session, and, in my opinion, it was rightly so dealt with, for the only material fact in dispute was the existence of the appellant's alleged contract of service with his father, but I agree with the opinion of Lord Hunter in *M'Sweeney* v. *Clan Line Steamers Ld.* (2), where the learned judge said : " More " than once, judges in this court have expressed the view " that it is extremely undesirable that arbitrators should " throw out applications by workmen under the Workmen's " Compensation Acts on the plea of relevancy. There may be " very exceptional cases where such a course would be " justified." The present case, in my opinion, is such an exceptional case, for the only point in the case is a clear-cut one, there is only one material fact in dispute, and the matter is suitable for discussion on relevancy. Even if the recent tendency is towards written pleadings in such applications, these should not be as strictly treated as they would be in an ordinary civil action. Apart from a few exceptional cases of which the present case and the case of *Conroy* v. *William Baird & Co., Ld.* (3) are examples, I am of opinion that the Act of 1925 intended to secure by s. 49 that the application should be heard, tried and determined after evidence before any appeal by stated case was taken, and should not be tried piecemeal. I agree with the motion proposed by the noble Lord on the woolsack.

(1) 1943 S. C. 12, 16.
(2) 1935 S. C. 651, 656.
(3) 1940 S. C. 446.

Lord Russell of Killowen. My Lords, the object of the Workmen's Compensation Act, 1925, is to secure (subject to a limit as to amount) compensation to a workman to whom personal injury by accident, arising out of and in the course of the employment, is caused. For brevity's sake, I refer only to accidents which injure, but do not kill, the workman. The person liable to pay the compensation is the employer in whose employment the workman was working at the time of the accident. The object of the compensation is to make good (subject always to a limit of amount) the damage which he sustains in the way of loss of earning-power by reason of the accident which has befallen him in the employment of that employer.

Sections 1 to 7 of the Act deal with the "Right to Com-"pensation," and define the conditions which must be fulfilled before a workman can establish a claim to such compensation. Sections 8 to 13 of the Act deal with the "Amount of Compensation," and provide how the amount payable by the employer is to be ascertained. For the present purpose it is sufficient to say that the compensation payable, in the case of a non-fatal accident, is a weekly payment during the incapacity for work, and is calculated by reference to (among other factors) the workman's "average weekly "earnings." Section 10 enacts that for the purpose of the provisions of the Act relating to "average weekly earnings" certain rules are to be observed of which the second runs thus:—"Where the workman had entered into concurrent "contracts of service with two or more employers under which "he worked at one time for one such employer and at another "time for another such employer, his average weekly earnings "shall be computed as if his earnings under all such contracts "were earnings in the employment of the employer for whom "he was working at the time of the accident." This provision is clearly inserted with the object of securing to the workman (within the prescribed limits as to amount) compensation for his loss of earning power both in reference to the wages paid him by the employer in whose employment the accident occurred and the wages paid him by other concurrent employers. The whole burden is thrown on the employer against whom the workman has (under ss. 1 to 7) established his right to compensation.

The sole question on this appeal is whether under the said second rule, the appellant is entitled to have his average weekly earnings computed as if his earnings under a concurrent contract of service with his father (in whose house he dwells) were earnings in the employment of the respondents. But for the definition of the word "workman" which is contained in s. 3 of the Act, there could, I conceive, be no answer to the appellant's claim. He is a workman (within the definition) who has established his right to compensation against the respondents. He claims to have the amount fixed, and in accordance with the second rule of s. 10. He is without doubt "the workman" referred to in that rule, and he has, in fact, entered into a contract of service with his father which is concurrent with his contract of service with the respondents, and under these two contracts he worked at one time for his father and at another time for the respondents. He fits exactly and in all respects into the words of the rule. It is said, however that, because of the statutory definition of "workman," his earnings in the employ of his father are not earnings under a concurrent contract of service within the meaning of the second rule.

The relevant words of s. 3 are as follows:—"(1.) In this "Act, unless the context otherwise requires, the expression "'workman,' subject to the exceptions hereinafter mentioned, "means any person who . . . . works under a contract of "service . . . . with an employer, whether by way of manual "labour, clerical work or otherwise . . . . (2.) The following "persons are excepted from the definition of workman, that "is to say:—(*a*) any person employed otherwise than by way "of manual labour whose remuneration exceeds 350*l.* a year; "or (*b*) . . . . (*c*) . . . . (*d*) . . . . (*e*) a member of the "employer's family dwelling in his house . . . ." As I understand the argument it is that, because the appellant is vis-à-vis his father not a workman within the definition, he is only to be compensated for his loss of part-time earning power, and that his earnings under his contract of service with his father are to be ignored. My Lords, I am unable to accede to this argument. It appears to me to be neither reasonable, nor in accord with the wording of the second rule. It is true that had the accident occurred during his employment by his father, he could recover no compensation at all. That is because the Act, for some reason unknown to me, gave him no right to compensation against his father, but since the accident occurred during his employment by the respondents, the Act does give against them the rights which the words of the

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Act define, one of which is that, in computing his average weekly earnings, there shall be included his earnings under all concurrent contracts of service with other employers. This right is given to him because he is a workman within the definition who has suffered loss of earning power by accident arising out of and in the course of his employment. I can find nothing in the second rule to deprive him of that right, or to exclude from it concurrent contracts of service with other employers as against whom the workman whose compensation is being quantified would have no claim for injury by accident arising out of or in the course of his employment by them. *S.S. Raphael* (*Owners*) v. *Brandy* (1) is a decision of your Lordships' House against any such exclusion. The words " employers," " employer " and " contracts of service " in the second rule bear their ordinary meanings without any restriction or qualification, for there is nothing in the Act to cut them down in any way. The reference in the second rule to " the workman " appears to me to be merely a reference to the person whose compensation (the right to which he has established) is being quantified.

The First Division appear to have reached their conclusion by drawing inferences as to how the second rule should be construed. Thus, Lord Moncrieff said (2) that since the right conferred by it " is in terms conferred upon one who is " described as a ' workman ' it seems a proper inference that " the average weekly earnings to be computed shall be earnings " by the applicant as a ' workman.' " In the same way the Lord President said (3) " It appears to me that s. 10 is " concerned throughout with the ' earnings ' and ' average " ' weekly earnings ' of a ' workman,' meaning thereby a man " in the capacity of workman within the meaning of the " Act." For myself, I see no justification for drawing these inferences, the result of which appears to be contrary to the intention of the Act, viz. to compensate the workman for loss of earning power; not to compensate only for loss of earnings under particular contracts of service. If proper effect is to be given to this intention, the inference should be the other way. To make the inclusion of earnings under a concurrent contract of service depend on whether the workman who is to be compensated is vis-à-vis the concurrent employer within the definition seems to me in conflict with that intention and may lead to strange results. For instance, two workmen employed by A at the same wage are injured in the same accident while in that employ. Each has concurrent contracts of service with his own father. The one who earns the larger wage under his concurrent contract lives with his father, the other does not. The man with the larger loss of earning power may get the smaller compensation. My Lords, I think it better to follow strictly the words of the second rule than to draw an inference that it means something which it does not in terms state. I would allow this appeal.

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(1) [1911] A. C. 413.

(2) 1943 S. C. 12, 16.

(3) Ibid. 17.

LORD MACMILLAN. My Lords, the appellant, while employed as a part-time workman by the respondents at 18*s*. a week, suffered personal injury by an accident arising out of and in the course of his employment. At the time of the accident the appellant was also employed for the rest of his time by his father with whom he lived, receiving from him a weekly wage with board and lodging. The question is whether, in computing the compensation payable to the appellant by the respondents, his average weekly earnings are to be reckoned as those which he received from the respondents alone or those which he received from both the respondents and his father.

Section 10 of the Workmen's Compensation Act, 1925, enacts that "for the purposes of the provisions of this Act "relating to 'earnings' and 'average weekly earnings' of "a workman" certain rules are to be observed. The second of these rules provides that "Where the workman had "entered into concurrent contracts of service with two or more "employers under which he worked at one time for one such "employer and at another time for another such employer, "his average weekly earnings shall be computed as if his "earnings under all such contracts were earnings in the "employment of the employer for whom he was working at "the time of the accident." If both the appellant's employers had been strangers to him there can be no doubt that the compensation payable to him by the respondents would, under the rule just quoted, have been reckoned on the basis of his combined earnings from both employments, but s. 3, sub-s. 2, of the Act provides that certain persons "are excepted from "the definition of workman," and among those excepted persons are "a member of the employer's family dwelling in "his house," which was the position of the appellant as

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regards one of his two employments, namely, the employment in which he did not meet with the accident. It is plain, therefore, that, if the appellant had been injured in his father's employment, he would have had no claim to compensation from his father as his employer, and, of course, no claim to compensation from the respondents.

The appellant, however, maintains that, in computing the compensation payable to him by the respondents, his earnings in his father's employment must be taken into account. I confess that, unaided or unembarrassed by authority, I should have read the second rule in s. 10 as applying only where a person was employed as a workman within the meaning of the Act under each of the concurrent contracts of service in question, but the decision of this House in *S.S. Raphael* (*Owners*) v. *Brandy* (1), apparently not cited in the Court of Session and not referred to in the debate at your Lordships' bar, is, in my opinion, conclusive of the matter to the opposite effect. There the workman, who was injured in an ordinary civil employment, was held entitled under the Act of 1906, sch. I, para. 2 (*b*), reproduced in the second rule of s. 10 of the Act of 1925, to bring into the computation of his compensation an annual retainer of 6*l*. paid to him as a stoker in the Royal Naval Reserve, although s. 9 of the Act (now s. 33 of the Act of 1925) expressly provided that the Act should not apply to persons in the naval service of the Crown. The respondents' argument in the present appeal was precisely that which Farwell L.J. stated so clearly in the Court of Appeal in *Brandy* v. *S.S. Raphael* (*Owners*) (2), and which was rejected by his colleagues and by this House. The contracts of service under the rule, said Fletcher Moulton L.J. (3), " are not restricted to contracts of service under which the " employer is liable to claims under the Act," and that was also the decision of this House. When Parliament in 1925 re-enacted in the second rule of s. 10 of the present Act the exact words of sch. I, para. 2 (*b*), of the Act of 1906 it must be taken to have done so in the knowledge that the meaning of the words it was using was that attributed to them by this House in 1911. I am, accordingly, of opinion that the appeal should be allowed. I would only add that I agree with the observations of my noble and learned friend Lord Thankerton regarding the conduct of arbitrations under the Act and the statement of cases on appeal

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(1) [1911] A. C. 413.
(2) [1911] 1 K. B. 376.
(3) Ibid. 383.

LORD WRIGHT. My Lords, this appeal has been argued on the assumption of a fact which is denied by the respondents, but is crucial to a final decision in the appellant's favour. The question at issue can be shortly stated. The appellant, while working for the respondents, sustained an injury by accident arising out of and in the course of his employment. There is no dispute that he is entitled to compensation from the respondents as a workman within the meaning of the Workmen's Compensation Acts, but the contest is as to the rate of compensation and that arises in this way. He was in the respondents' part-time employment as an omnibus driver at an average weekly wage of 18*s.*, but he was also, it is assumed, serving under a contract of service with his father at an average weekly wage of 2*l.* 10*s.* 0*d.*, plus board and lodgings estimated at 25*s.* a week. He claims to be entitled, in virtue of s. 10 (i.) of the Workmen's Compensation Act, 1925, to compensation on the basis of adding together his weekly earnings under the contract of service with the respondents and his weekly earnings under the contract of service with his father. This computation would obviously give him a much larger rate of compensation and one more adequate to his loss than that offered by the respondents who have contended that the only earnings to be taken into account are those received under the appellant's employment with the respondents.

The dispute turns entirely on the true construction of the Workmen's Compensation Act, in particular ss. 3 and 10 (ii.). Section 10 (ii.) of the Act provides that : " Where the workman " had entered into concurrent contracts of service with two " or more employers under which he worked at one time " for one such employer and at another time for another " such employer, his average weekly earnings shall be computed " as if his earnings under all such contracts were earnings in " the employment of the employer for whom he was working " at the time of the accident." This provision occurs in the part of the Act which specifically deals with " Amount of " Compensation." The respondents object that, whatever might be the effect in other cases, here the provision is excluded by reason of the definition of workman in s. 3 of the Act of 1925, which by sub-s. 2 (*e*) excepts from the definition (inter alios) "a member of the employer's family dwelling in his "house." According to the case stated, this description is applicable to the appellant. It is, accordingly, contended on behalf of the respondents that, in consequence, s. 10 (ii.) cannot operate as it otherwise would so as to enable the appellant to include his earnings under his employment with his father in computing the compensation to which he is entitled from the respondents because that employment and those earnings are excluded from the provisions of the Act and cannot be brought in under s. 10 (ii.). Now, it is clear that s. 3 would have the effect of preventing the appellant from claiming under the Act compensation from his father if he had been injured in the employment of his father. In a question with his father he would not be a person entitled to compensation, because he would not be a "workman." Section 3, however, comes in the part of the Act that deals with "Right to Compensation," while s. 10 (ii.) comes within the part which deals with the "Amount of Compensation," which is a different matter. It presupposes that the right has been established. Once the claimant has qualified as a "workman" within the meaning of the Act in respect of the particular employment in which he was working and in which he was injured a different portion of the Act, that dealing with the quantum of compensation, has to be considered. In that context, it is said, the words of s. 10 (ii.) literally apply to the present case, since the appellant had entered into concurrent contracts of service, the one with the respondents and the other with his father. It has not been contested that he was a "workman" quoad the former employment and the actual words of the Act do not carry the condition of being a "workman," according to the definition of s. 3, into s. 10 (ii.). All that the section requires is that the claimant should have entered into a concurrent contract of service with the employer other than the employer in whose service he was injured. He need not be a "workman" within the definition of the Act in regard to that contract. "Concurrent," in my opinion, means no more than "running at the same time." The word "employer" is apt to describe the father: indeed in s. 3, sub-s. 2 (*e*), the word "employer" is used. The relevant words are "a member of the employer's family dwelling in "his house." There is then, in my opinion, nothing in the actual words of s. 10 (ii.) to justify limiting them in the way the respondents desire. So to limit the provision would involve

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inserting words to the effect that though in the one contract of service, under which he is claiming, he must satisfy the express statutory definition of "workman," yet as a matter of implication and by intendment of law, he must also and equally satisfy that definition in respect of the other employment. To my mind, there is no justification, still less necessity, for making that implication. To do so, I think, would be contrary to the general object of the Act, which is that a man who sustains injury by accident arising out of and in the course of his employment, should be compensated by the employer in whose service he was injured for his loss of earning capacity. The obligation to compensate is thrown on that employer. Without s. 10 (ii.) the compensation would be imperfect, because it would not include the loss of the earnings in the other employment, though they were as much lost by reason of the accident as the man's earnings in the employment in the course of which the accident occurred. If this result had been intended, the legislature, I think, would have made the matter clear. I see no sufficient reason to introduce by way of implication the exception to the right to compensation under s. 3, sub-s. 2, into the alien context of s. 10 (ii.), which is concerned with the scale of compensation once the definition in s. 3 has been satisfied. Qualifications which are not expressed can only be implied if they are necessary to give effect to what the legislature must have intended. To my own way of thinking, though it is true that in construing a statute the principle applies that the different provisions must be read together, that is only true in so far as the different provisions are in substance coherent and the one set are plainly necessary to supplement or qualify the other. I cannot myself see any sufficient reason for bringing in to s. 10 (ii.) the limitations expressed in s. 3 which have a different purpose from that of s. 10 (ii.) and are enacted alio intuitu. To do so would not, to my mind, be to supplement s. 10 (ii.) but pro tanto to defeat its purpose. The employer's liability, it may be observed, is limited by the scale of maximum amounts of compensation fixed by the Act.

This conclusion, which I arrived at after the argument, is confirmed by a decision of this House, very pertinent, though not cited by counsel on either side. It is the decision in *S.S. Raphael (Owners)* v. *Brandy* (1), under the Workmen's Compensation Act, 1906. The claimant was a seaman who was

(1) [1911] A. C. 413.

injured while in the employment of the shipowner. He was also in the service of the Crown, in that he was subject to be called up for service in the Royal Naval Reserve and was paid an annual retaining fee. He claimed that he had entered into concurrent contracts of service, one with the shipowner and the other with the Crown, and that under the provisions of sch. I, para. 2, of the Workmen's Compensation Act, 1906, which corresponded with s. 10 (ii.) of the Act of 1925, he was entitled to have his earnings under the latter contract brought into the assessment of his compensation. The objection taken was that by s. 9, sub-s. 1, of the Act of 1906, which corresponded with s. 33 of the Act of 1925, the Act was not to apply to persons in the naval and military service of the Crown. The House rejected that objection, affirming the decision of the majority of the Court of Appeal. Farwell L.J., who dissented (1), would have read into sch. I, para. 2, of the Act of 1906, after the word "workman," the words "being a workman within the Act," and after the word "employer," the words "within the Act." That construction was rejected. Fletcher Moulton L.J., in the Court of Appeal, said (2): "The language of sch. I, para. 2, is perfectly general. "The contracts of service therein referred to are not restricted "to contracts of service under which the employer is liable to "claims under the Act." He added that the object of the paragraph was to enable the tribunal to arrive at a proper estimate of the average weekly earnings of the workman for the purpose of measuring the compensation under a contract of service under which an employer was liable. I think that that decision does in principle cover the present case.

Appeal allowed.

Solicitors for appellant: *Kingsford, Dorman & Co., for Allan McDougall & Co., S.S.C., Edinburgh, and R. Maguire, Cook & Co., Glasgow.*

Solicitors for respondents: *Caporn & Campbell, for Ross & Ross, S.S.C., Edinburgh.*

(1) [1911] 1 K. B. 376, 385. (2) Ibid. 383.

Dictum of Viscount Simon, at p. 53, *applied.* Mackrell *v.* Mackrell. [1948] 2 All E.R. 858.

Dictum of Lord Simon, L.C., at p. 52, *applied.* Cook *v.* Cook. [1949] 1 All E.R. 384.

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Nov. 17;
Dec. 15.

HENDERSON . . . . APPELLANT;

AND

HENDERSON AND CRELLIN . . . RESPONDENTS.

(*Ex parte* as to Crellin.)

Followed. Viney *v.* Viney. [1951] 2 All E.R. 204.

Divorce — Adultery — Condonation — Forgiveness — Conditional on guilty spouse's promise as to future conduct—Effect.

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[1951] P. 4

A wife who had committed adultery promised her husband that, if he would forgive her, she would break off all acquaintance with the co-respondent. Thereupon, intercourse took place, but early next morning the wife's attitude changed and she said she did not see why she should stop seeing the co-respondent:—

Held, that as there was no evidence that, when it was made, the wife's promise was a fraudulent mis-statement of her state of mind, the husband's act in consenting to intercourse amounted to condonation debarring him from obtaining a divorce.

Sexual intercourse amounts to condonation of a wife's adultery unless she induced it by a fraudulent mis-statement of fact. A breach of an assurance as to future conduct will not remove the disabling consequences of condonation, since there is no such thing as contingent condonation.

Decision of the Court of Appeal affirmed.

Appeal from the Court of Appeal.

The facts, stated by Viscount Simon L.C., were as follows: The appellant petitioned for divorce from his wife, who was the first respondent, on the ground of her adultery with the second respondent. The suit was defended, but Hodson J., who tried the case, found that the adultery was proved. Both the respondents had made admissions of their guilt. The appellant, however, in the course of his evidence, stated matters which raised the question of condonation. He stated that, after the first respondent had admitted to him her adultery, he told her that she must entirely break off all acquaintance with the second respondent if he (the appellant) were to remain with her, and that she promised to do so. Thereupon, the appellant and the first respondent went to bed together. He forgave her and had sexual intercourse with her that night at her suggestion. Early the next morning her attitude changed, and she said she did not see why she should stop seeing the second respondent, and that,

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if she denied the adultery, the second respondent ought to do so too. Upon this, the appellant left the house and never lived with her again. It was argued that there was no condonation, since the appellant's forgiveness of the first respondent was conditional on her promise to have no more to do with the second respondent and this promise was withdrawn after he had had intercourse with her. Hodson J. rejected this contention. He pointed out that there was no evidence that the wife and the second respondent had associated together since the promise was given, and added : "I can see no ground for finding that the respondent, "when she made the promise, was making a fraudulent "representation as to her future intention." Hodson J. referred to McCardie J.'s judgment in *Cramp* v. *Cramp and Freeman* (1) and agreed with that learned judge's conclusion that "a husband who has sexual relations with his wife after "knowledge of her adultery must be conclusively proved to "have condoned her offence." He, therefore, reached the conclusion that the appellant had condoned the first respondent's misconduct, and he refused the decree for which he asked. The Court of Appeal (Scott, MacKinnon and Goddard L.JJ.) confirmed the conclusion of Hodson J., and also held that the appellant's actions, after he knew the facts as to the first respondent's unfaithfulness, amounted to condonation which deprived the appellant of the right to a decree based on those facts, and that, whether condonation should be regarded as a question of law or a question of fact, the conclusion in the present case that there was condonation was right and was fatal to the appellant's claim. The appellant appealed to the House of Lords.

Beyfus K.C. and *M. Turner-Samuels* for the appellant. A husband who has sexual intercourse with his wife after knowledge of her adultery is not in all circumstances conclusively proved to have condoned her offence : see *Mummery* v. *Mummery* (2). In his case, as in the case of a wife, the court can look at the totality of the circumstances to see whether what took place actually amounts to condonation : see *D'Aguilar* v. *D'Aguilar* (3) and *Roberts* v. *Roberts and Temple* (4). In the latter case Hill J. (5) distinguished between

(1) [1920] P. 158, 170.
(2) [1942] P. 107.
(3) (1794) 1 Hag. Ecc. 773, 781.
(4) (1917) 117 L.T. 157.
(5) Ibid. 159.

"an appearance but not the reality of forgiveness." That case is in opposition to the dictum of McCardie J., in *Cramp* v. *Cramp and Freeman* (1) and should be preferred to it. Mere forgiveness is not condonation : *Crocker* v. *Crocker* (2). Condonation is forgiveness in action as distinct from an attitude of mind. It is the re-instatement of a wife in her position as wife. Sexual intercourse is prima facie strong evidence of such restoration, and save in exceptional circumstances it is normally enough to establish condonation, but the single act of intercourse in the present case is not sufficient to deprive the appellant of his right to a decree for the dissolution of his marriage. He consented to that act only on the basis that the first respondent was a sincerely repentant woman, and from the evidence it is clear that she was not. She persuaded him to consent to intercourse by a promise which was not genuine at the time when it was given. Her actions fall half way between fraud and absence of fraud. If she had no settled state of mind about her attitude towards the matter of seeing the second respondent, and merely made the promise to end the discussion there can have been no condonation. The appellant was cheated into forgiveness if she was still flirting with the idea of continuing to see the second respondent. The shortness of the period within which she expressed another intention throws light on the state of her mind when she made the promise. In all the circumstances there can be no condonation if the sexual intercourse took place on the basis of a misunderstanding. It would be a grave hardship on the appellant if the happenings of those few hours deprived him of his right to a decree. If necessary the case should be sent back to the judge to clarify his findings as to the state of mind of the first respondent when she made the promise.

M. Turner-Samuels following. The act of sexual intercourse was induced by the first respondent by means of a promise which was neither serious nor sincere. Assuming that condonation was established, her subsequent conduct was such as to revive the adultery, namely, her indication that she intended to continue a course of association with the adulterer, a thing contrary to all the decencies of married life : see Halsbury's Laws of England (2nd ed.), vol. 10, p. 680, para. 1006, and *Durant* v. *Durant* (3).

(1) [1920] P. 158, 170.
(2) [1921] P. 25, 29.
(3) (1825) 1 Hag. Ecc. 733, 737, 761, 765.

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Viscount Simon L.C. Mr. Bush James, the House does not require to hear you on the merits of this appeal but their Lordships would like to hear from you whether there are any other authorities which they ought to consider before reaching their conclusion.

Bush James K.C. and *Ifor Lloyd* for the first respondent referred to *Collins* v. *Collins* (1) and *Keats* v. *Keats and Montezuma* (2).

The House took time for consideration.

Dec. 15. Viscount Simon L.C. My Lords, I entertain no doubt that the conclusion in the courts below was correct. Condonation in connexion with the law of divorce has been defined in a variety of phrases in many previous judgments. The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place, but where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect. The exception is that, if the intercourse was induced by a fraudulent mis-statement of fact by the wife, that circumstance will prevent the husband's actions from having the effect of condonation, as, for example, in *Roberts* v. *Roberts and Temple* (3), where the husband petitioned for a dissolution of his marriage on the ground of the wife's adultery and it appeared that she had confessed the adultery but had denied, in answer to his question, that she was pregnant in consequence of it, whereupon the husband forgave her and had marital relations with her. It was held by Hill J. that, since the wife knew she was pregnant and had induced the acts of her husband by false and fraudulent statements, he had not condoned her adultery and was entitled to his decree. I think this decision was right, and the view subsequently expressed by McCardie J.

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(1) (1884) 9 App. Cas. 205, 259.
(2) (1858) 1 S. & T. 334.
(3) 117 L. T. 157.

in *Cramp* v. *Cramp and Freeman* (1) should not be understood to cover the exceptional case where the guilty party has made a deliberately false statement and has thereby brought about a situation which would otherwise have been proof of condonation.

It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations. In *Snow* v. *Snow* (2) Dr. Lushington discusses at length whether, where a husband has been guilty of cruelty, a wife can ever maintain a suit where co-habitation was continued after the last act, and he concludes that subsequent co-habitation is not universally a bar to the wife's suit, for the reason above stated, but I know of nothing in the earlier decisions, either in the ecclesiastical courts or in the Divorce Court of this country, which supports the view that a husband who has intercourse which is not induced by the fraud of the wife after knowledge of the facts of his wife's adultery, should not thereby be regarded as condoning his wife's misconduct.

Mr. Beyfus in his ingenious argument advanced the proposition that condonation by the husband is not established by the resumption of intercourse if that intercourse was obtained by a promise given by the wife to the husband as to her future conduct which is not genuine or sincere at the time when it was given. To that contention there are two answers. In the first place, the facts in the present case and the findings of the learned judge do not involve the view that the wife was not genuine and sincere at the time when she made the promise to her husband that she would keep away from the co-respondent's company. Hodson J. negatives the view that the first respondent, when she made the promise, was making a fraudulent misstatement as to her future intentions. On the contrary, he finds that in the morning, after the promise had been given and intercourse had taken place, the first respondent changed her mind. But, further, the proposition is itself unsound in law. There cannot be such a thing as contingent condonation by a husband of his wife's adultery—

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(1) [1920[P. 158, 170.

(2) (1842) 2 Notes of Cases, Supp. i., xiii.

certainly not when the condonation includes the irrevocable act of sexual connexion. I agree with the views on this point expressed by Lord Merriman P., and Henn Collins J., in *Abercrombie* v. *Abercrombie* (1). It is, of course, quite true that condonation is subject to one implied condition, but that is the condition that, if the spouse who had been forgiven past matrimonial offences is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as further ground for a divorce, but condonation cannot be treated as cancelled because an erring wife who makes promises as to her future conduct withdraws the promise later on. Condonation is not a contract in which one party may claim to be discharged by the other's repudiation. Condonation is not a contract at all. It is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife deliberately misrepresenting her true state of mind, for, as Bowen L.J. said in a well-known passage, the state of a person's mind, when it can be definitely ascertained, may be as much a fact as the state of his digestion: *Edgington* v. *Fitzmaurice* (2). That is not the same thing as saying that the husband is not to be treated as condoning if he believed in the wife's promise to behave as she should in the future. Lord Merrivale P., in *Sneyd* v. *Sneyd and Burgess* (3) rightly insisted that belief is not the test. It is fraudulent misstatement of fact, not assurances as to future conduct, which may remove the disabling consequences of condonation. I move that this appeal be dismissed.

LORD THANKERTON: My Lords, I agree.

LORD RUSSELL OF KILLOWEN: My Lords, I also agree.

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(1) (1943) 169 L. T. 340, 343, 345.

(2) (1884) 29 Ch. D. [459], 483.

(3) [1926] P. 27, 32, 33.

LORD MACMILLAN: My Lords, I agree.

LORD WRIGHT: My Lords, I agree.

Appeal dismissed.

Solicitors for appellant: *Isadore Goldman & Son*, for *R. R. Crute & Sons, Sunderland.*

Solicitors for respondent: *Maude & Tunnicliffe*, for *Wilford, Speeding & Hanna, Sunderland.*

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1943
Nov. 29, 30
Dec. 15.

WESTMINSTER ASSESSMENT COMMITTEE . . . . APPELLANTS;

AND

CONSERVATIVE CLUB . . . . . RESPONDENTS.

Rates — Metropolis — War — Reduction in value — Particular hereditament and comparable hereditaments—" Classes of hereditaments "—Rating and Valuation (Postponement of Valuations) Act, 1940 (3 & 4 *Geo.* 6, *c.* 12), *s.* 1, *sub-s.* 2 (*b*).

By s. 1 of the Rating and Valuation (Postponement of Valuations) Act, 1940: " (1.) The period for which the valuation lists " in force under the Valuation (Metropolis) Act, 1869, on the " date of the passing of this Act shall remain in force is hereby " extended until the fifth day of April in the prescribed year . . . . " (2.) While the said valuation lists remain in force, any increase " or reduction in value attributable directly or indirectly to the " present emergency, to the extent that the increase or reduction— " (*a*) is peculiar to a particular hereditament; or (*b*) affects " a particular hereditament and also other hereditaments of a " comparable character in the rating area in question but does not " represent a general alteration in the values of all classes, or " substantially all classes, of hereditaments in that area, shall, in " relation to that hereditament, be deemed to be an alteration " in the matters stated in the valuation list within the meaning " of para. 1 of s. 46 of the said Act (which relates to supplemental " lists) and to be such an increase or reduction in value as is referred " to in s. 47 of the said Act (which relates to provisional lists) . . . . " (4.) In this section, the expression ' the prescribed year ' means

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**Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD WRIGHT "such year as His Majesty may by Order in Council appoint, not "being later than the second year after that in which the end of "the present emergency falls . . . ."

The meaning of "classes" of hereditaments in s. 1, sub-s. 2 (*b*), of the Act is to be gathered from the words which associate "other "hereditaments of a comparable character" with "a particular "hereditament." A class of hereditaments means a list or group of premises which, for the purposes of rating valuation, may be regarded as possessing comparable features. Hereditaments cannot be divided up with scientific precision into a defined number of "classes" as though there were a fixed number of species included within the genus.

The question whether a reduction in the value of a hereditament is one which affects that hereditament and also other hereditaments of a comparable character in the rating area, or whether it represents a general alteration in the values of all classes, or substantially all classes, of hereditaments in that area, is a question of fact to be decided by quarter sessions on the evidence before it.

Decision of Court of Appeal affirmed.

Appeal from the Court of Appeal.

On January 9, 1941, the respondents, the Conservative Club, who occupied premises in St. James's Street, W., appealed to London quarter sessions against a decision of the appellants, the Westminster Assessment Committee, fixing the assessment of those premises at 6,800*l*. gross value and 5,663*l*. rateable value, in place of an assessment of 8,500*l*. gross value and 7,080*l*. rateable value in the quinquennial valuation list for the quinquennium 1936–41. The respondents contended that the values should be reduced to 5,000*l*. gross value and 4,163*l*. rateable value. They contended (inter alia) that they were entitled to relief both under the Rating and Valuation (Postponement of Valuations) Act, 1940, and under the Valuation (Metropolis) Act, 1869; that the "reduction in "value was attributable directly or indirectly to the present "emergency" within the meaning of s. 1, sub-s. 2, of the Act of 1940; and also that the reduction in value by reason of factors and circumstances arising out of the present emergency, including the "black-out" was due to a "cause" within the meaning of s. 47 of the Act of 1869. The appellants contended (inter alia) that the effect of the "black-out" in reducing the value of these premises was not peculiar thereto; that there had been a general reduction in the values of substantially all classes of hereditaments in the rating area; and that only so much of the reduction in value of the premises as did not represent this general reduction was to "be deemed "to be an alteration in the matters stated in the valuation "list" by virtue of s. 1, sub-s. 2, of the Act of 1940. Mr. Philip Michael Faraday, surveyor, was called to give evidence on behalf of the respondents, and the rating committee of quarter sessions found the following facts proved or admitted: "(*a*) During the year ended April 5, 1940, the "value of the club was reduced to 5,000*l.* gross value or "thereabouts by reason of factors and circumstances arising "out of the present emergency, including the general lighting "restrictions known as the 'black-out.' (*b*) The majority of "hereditaments in the city of Westminster were reduced in "value, but in varying degrees, by reason of some or all of "the said factors and circumstances. (*c*) A substantial "number of hereditaments and classes of hereditaments in "the said city were not affected in value by any of the said "factors or circumstances or at all. (*d*) A smaller number "of hereditaments in the said city, including some of "important value, were increased in value by reason of the "said factors and circumstances or some of them . . . . "(*h*) There was no general reduction in value of all or "substantially all hereditaments or classes of hereditaments in "the said city by reason of the said factors or circumstances "or at all, and such reduction as took place in the value of "certain hereditaments was not uniform but varied greatly "in amount and degree." The decision of the rating committee was as follows: "The committee are satisfied that the war "and the conditions arising out of it, including the "'black-out' are a 'cause' and in addition that it is a question "of fact for the committee. They are also satisfied as to the "fact that the reduction in value is peculiar to this hereditament and is not generally applicable to all hereditaments, or "substantially all hereditaments in the city of Westminster. "The figures will, therefore, be amended to 5,000*l.* gross and "4,163*l.* rateable." The appellants appealed to the Divisional Court of the King's Bench Division, the question being stated as follows: "Whether on the facts as found by us we were "entitled to come to the said decision, and, if not, what "should be done in the premises." Transcripts of the evidence of Mr. Faraday were annexed to the case. The decision of the Divisional Court (Viscount Caldecote C.J., Humphreys and Asquith JJ.) was in favour of the respondents. The appellants appealed. During the hearing before the Court of Appeal (Lord Greene M.R., Scott and MacKinnon L.JJ.)

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it was agreed between the parties, at the invitation of the court, as follows: (1.) that when the rating committee found that the "reduction in value is peculiar to this "hereditament" they meant that the reduction affected this particular hereditament and also other hereditaments of a comparable character in the rating area, and (2.) that to the question for the opinion of the court appearing in the special case was to be added the question whether there was any evidence before the rating committee to justify findings (*c*) and (*h*). The Court of Appeal affirmed the decision of the King's Bench Division, holding that there was evidence on which the findings of fact could be justified. The appellants appealed to the House of Lords.

Montgomery K.C. and *Squibb* for the appellants. Most of the hereditaments in Westminster have suffered a reduction in gross and rateable values through the present emergency. The greater part of the reduction of these premises and others in the rating area merely reflected "a general alteration in "the values of all classes, or substantially all classes, of "hereditaments in that area." Parliament, in passing the Act of 1940, assumed that there had been some alteration in values, and, accordingly, it is strange to find quarter sessions holding that "there was no general reduction in value of all or "substantially all classes of hereditaments" in the rating area by reason of circumstances arising out of the present emergency: see finding (*h*). If that were so, there would be nothing for the words "a general alteration" in s. 1, sub-s. 2 (*b*), of the Act to operate on. In fact, it had been necessary to pass the Act because in *Rex* v. *Westminster Assessment Committee. Ex parte Junior Carlton Club* (1) it had been held that a circumstance like war affecting all classes of the community generally was not a cause within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869. The word "general" does not mean universal. In this sub-section it means the bulk of the hereditaments. The fact that a few may not have been reduced in value makes no difference to the generality of the reduction. The question whether or not there has been a general reduction is not one for the witness. He can only give particulars, providing material for the court to decide, see *Joseph Crosfield & Sons, Ld.* v. *Techno-Chemical Laboratories, Ld.* (2). Further, in dealing with the question of the alteration

(1) (1940) 38 L. G. R. 326.

(2) (1913) 29 T. L. R. 378, 379.

in the values of "all classes, or substantially all classes of "hereditaments," the witness was faulty in his method of grouping into "classes." In s. 1, sub-s. 2 (*b*), the words are equivalent to "hereditaments of a comparable character." Taking them in that sense, it appears that, while there are a very large number of classes of hereditaments in the rating area, the words "substantially all classes of hereditaments" would be complied with, even though, in the case of a considerable number of classes, the values had not been reduced by reason of circumstances arising out of the emergency, so long as the number was not a large proportion of the whole number of classes.

Comyns Carr K.C. and *Grant K.C.* for the respondents were not called on to argue.

The House took time for consideration.

Dec. 15. VISCOUNT SIMON L.C. My Lords, the procedure which has been followed is not in all respects regular, as before the Court of Appeal the parties, at the invitation of the court, agreed not only to formulate in quite different terms one of the findings in the case stated, but added a further question (whether there was evidence to support certain contentions which the court of quarter sessions accepted) to the question which was propounded at the end of the case for the opinion of the High Court. The House is, I understand, prepared to overlook these irregularities in this instance, in order to decide the real issue between the parties.

That issue is as follows. Under the Valuation (Metropolis) Act, 1869, a fresh quinquennial valuation for London was due in 1941, but, in view of the emergency resulting from the war, Parliament in March, 1940, passed the Rating and Valuation (Postponement of Valuations) Act of that year. The effect of this latter Act was twofold. In the first place, by s. 1, sub-s. 1, it prolonged the period for which the then operative quinquennial valuation lists would remain in force (and thus, in effect, postponed any new valuation list) until April 5 in the "prescribed year," i.e., a year to be appointed by order in council which might be not later than the second year after that in which the present emergency ended (s. 1, sub-s. 4). In the second place, it laid down, in s. 1, sub-s. 2, a statutory rule by which to determine whether and how far an increase or reduction in value attributable to the present emergency, during the currency of the existing valuation lists, was to be deemed to be an alteration to be shown in a supplemental list under s. 46 of the Valuation (Metropolis) Act, 1869, or to be such an increase or reduction in value as is referred to in s. 47 of that Act, which relates to provisional lists.

In interpreting an Act of Parliament it is legitimate to take note of earlier judicial decisions which may throw light on, and help to explain, the terms of the enactment, and it is instructive to observe that after the outbreak of war and before the Act of 1940 was passed, there had been two attempts by London ratepayers to rely on war conditions leading to a falling off in receipts as a " cause " reducing the value of a hereditament and thus entitling them to take advantage of s. 47 of the Act of 1869 and to get a reduced assessment : *Rex* v. *Westminster Assessment Committee. Ex parte Junior Carlton Club* (1) and *Rex* v. *Westminster Assessment Committee. Ex parte St. James' Court Estate Ld.* (2). These attempts failed because it was held that the operation of the " cause " was not a special feature of the particular hereditament in question, but was one that applied generally, and that the fall in receipts was " due to the general consequences of the war " : per Lord Hewart C.J. (3). It is not difficult, therefore, to understand why Parliament thought it well to include in the Act of 1940 some specific provision on the subject. The provision in s. 1, sub-s. 2, is as follows : " While the said " valuation lists remain in force, any increase or reduction in " value attributable directly or indirectly to the present " emergency, to the extent that the increase or reduction— " (*a*) is peculiar to a particular hereditament ; or (*b*) affects " a particular hereditament and also other hereditaments of " a comparable character in the rating area in question but " does not represent a general alteration in the values of all " classes, or substantially all classes, of hereditaments in that " area, shall, in relation to that hereditament, be deemed to " be an alteration in the matters stated in the valuation list " within the meaning of para. (1.) of s. 46 of the said Act " (which relates to supplemental lists) and to be such an " increase or reduction in value as is referred to in s. 47 of " the said Act (which relates to provisional lists)."

The contention of the respondents was, and is, that the assessment should be reduced to 5,000*l.* gross value, with corresponding rateable value, and these are the figures fixed by quarter sessions subject to the case stated. It was not disputed that the annual value of the club was reduced from 8,500*l.* to 5,000*l.* gross value by reason of circumstances arising out of " the present emergency," including the lighting restrictions, but the appellants contended that only part of this fall in value—viz. from 8,500*l.* to 6,800*l.*—was due to special depreciation justifying a lowering of the assessment, and that the remaining reduction in value, caused to this and other clubs of a comparable character in Westminster by the influence of the emergency, merely reflected " a general " alteration in the values of all classes, or substantially all " classes, of hereditaments in that area." Whether this is so or not is a question of fact to be decided by quarter sessions on the evidence before it.

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(1) (1940) 38 L. G. R. 326.

(2) (1940) 11 De-rating and Rating Appeals 118.

(3) 38 L. G. R. 326, 327.

Mr. Montgomery analysed Mr. Faraday's evidence with a view to showing that the witness had dealt with various " classes " of hereditaments in the area, attributing reduction in value to some classes and no reduction in value to other classes, but that this grouping into " classes " was faulty and that this alleged fault had led to an unwarranted conclusion. Mr. Montgomery also claimed to detect in Mr. Faraday's evidence a confusion between two possible meanings of the statutory phrase " a general alteration in values " and contended that " general " in this connexion did not mean " universal," so that a general alteration could exist even though there were some exceptions. On the second argument, I agree with Mr. Montgomery, but I do not find in the case any indication that quarter sessions reached its conclusion by assuming that an occasional exception would necessarily prevent an alteration from being " general." Neither do I think that Mr. Faraday's evidence implied this. As to the first argument, it seems to me to be a mistake to suppose that hereditaments can be divided up with scientific precision into a defined number of classes, as though there were a fixed number of species included within the genus. The meaning of " classes " in s. 1, sub-s. 2 (*b*), is to be gathered from the opening words, which associate with a particular hereditament " other hereditaments of a comparable character," and all that is meant by a class of hereditament is a list or group of premises which, for the purposes of rating valuation, may be regarded as possessing comparable features. Quarter sessions

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found as a fact that the reduction in value which affected the Conservative Club was not a reduction which was generally applicable to all hereditaments or substantially all hereditaments in the City of Westminster. There was evidence before the court which would support this conclusion, and there is no sufficient ground for holding that, in reaching it, the court misdirected itself as to the meaning and application of the section. The appeal, therefore, fails.

A further question was raised between the parties whether the respondents could make good their claim without invoking the Act of 1940, by relying on the finding of quarter sessions that the war and the conditions arising out of it as affecting the value of the club premises were a " cause " of reduction in value within the meaning of s. 47 of the Act of 1869. In view of the conclusion at which I have arrived under the Act of 1940, this further question becomes immaterial. I move that the appeal be dismissed with costs.

LORD THANKERTON. My Lords, I concur.

LORD RUSSELL OF KILLOWEN. My Lords, I agree.

LORD MACMILLAN. My Lords, I also agree.

LORD WRIGHT. My Lords, I also agree.

Appeal dismissed.

Solicitors for appellants : *Allen & Son.*
Solicitors for respondents : *Richardson, Sadler & Co.*

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Nov. 4, 8, 9, 11; *Dec.* 15.

[HOUSE OF LORDS.]

RICHARDSON . . . . APPELLANT ;

AND

REDPATH, BROWN & COMPANY LIMITED . . . . RESPONDENTS.

Workmen's Compensation—Medical assessor—Functions—Examination of workman—Report to arbitrator—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *sch. I, para.* 5.

During the hearing of an application by employers for a review of weekly payments to a workman under the Workmen's

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* *Present :* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD WRIGHT.

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Compensation Acts on the ground that the continuance of his disability was attributable to his unreasonable refusal to undergo an operation, the medical assessor intimated a wish to examine him and the examination took place in private out of court. The arbitrator, basing his conclusion on the advice of the medical assessor, made an award in favour of the employers :—

Held, that the view of the medical assessor, based on the examination, was improperly introduced into the case and that the arbitrator's decision founded thereon could not stand :—

Held, further, that the question was not whether the medical advice given to the workman against the operation was more soundly based than the advice in favour of it, but whether, in refusing to be operated on, he was acting unreasonably in view of the advice he had received.

Steele v. *Robert George & Co. (1937) Ld.* [1942] A. C. 497 applied.

It is not part of the function of a medical assessor as such to conduct a personal examination of the workman or to report the effect of the examination and his deductions from it to the arbitrator.

Proposition deduced from *Smith* v. *Foster* (1913) 6 B. W. C. C. 498, overruled.

An arbitrator faced with a conflict of medical testimony has power under sch. I, para. 11, to the Workmen's Compensation Act, 1925, to submit the medical issue duly defined to a medical referee, and for this purpose he may select the medical assessor. The workman is then obliged to submit to an examination, and the subsequent report will be in writing and available to the parties and to the arbitrator as part of the materials in the case.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal.

The facts, stated by Viscount Simon L.C., were as follows : In April, 1937, the appellant, Simeon Richardson (hereinafter called " the workman ") met with an accident arising out of and in the course of his employment as a steel erector by the respondents (hereinafter called " the employers "), which resulted in a rupture, in consequence of which he received, by agreement with his employers, weekly payments on the basis of total incapacity. This agreement was recorded in the ordinary way in the county court. In June, 1937, the workman was operated upon for the hernia, but this operation did not effect a complete cure and when, in May, 1938, the employers applied for a review or termination of the weekly payments, alleging the workman's partial recovery and ability to resume work, the application failed. In December, 1941, the employers again applied for a review of the weekly payment, and the material ground of this claim was that the workman's

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continuing incapacity was due to his unreasonable refusal to submit to suitable medical treatment, namely, a further surgical operation for the radical cure of the hernia. The matter came before Sir Gerald Hurst K.C., the judge of the Westminster county court, who heard the case on February 27, 1942, with the assistance of Dr. Brend, the well-known specialist in nervous diseases, as his medical assessor. The employers, on whom rested the burden of proving the workman's unreasonable refusal, called as witnesses three doctors, Dr. Felling, Dr. Burney and Dr. Blake Pritchard, who expressed the view that the operation was advisable and should be successful. The workman gave evidence that he was prepared to take medical advice, but that he was advised by a Dr. Munro that he should not undergo such an operation. Dr. Munro was not available as a witness, since he was in the army, but two other medical men of high standing, Dr. Drought and Sir Ambrose Woodall, were called as witnesses to support the workman's case. They stated that they were definitely against such an operation which they thought would be positively injurious to the man's nervous condition. The previous operation on the workman for this same hernia, instead of making him a fit man, had, according to them, induced a condition of neurosis which, in the view of these two doctors (both of whom had also examined him before the first application), had persisted and was likely to be further aggravated if a second operation were now attempted. This concluded the evidence and counsel for the workman began his final speech by arguing that, in view of the failure of the first operation to produce a cure and of the nervous disturbance which resulted from it, the workman was not acting unreasonably if, even apart from any advice, he refused to be operated upon for the second time ; and, further, that, in view of the advice now given against the operation by the two specialists, the court had no materials before it which could justify the view that the man was acting unreasonably. At this point the judge stopped the workman's counsel and called on counsel for the employers. During the latter's speech the judge intimated that the medical assessor, who had never examined the workman before, would like to examine him. No objection was made, and this examination took place in private out of court. There was no information as to what passed between the workman and the medical assessor, but, upon the resumption of the hearing, the judge intimated that the medical assessor's view was in favour of the proposed operation. After further argument from counsel on both sides, the learned judge gave judgment. He said (inter alia): "I have the advantage of Dr. Brend's advice and I accept "and adopt his view . . . . He draws attention to the fact "that the respondent [the workman] has suffered from the "bombing due to the war both in London and in Watford, "and the view he takes is that this disposition of the "respondent would have taken the same course even if the "minor rupture now present had not occurred at all. He "also draws attention to the fear of going into hospital. It is "impossible to link up the alleged neurosis or the nervous "temperament either with the accident or the operation . . . . "The advice of Dr. Brend is that he should have the operation. "The respondent says he obtained an opinion from a panel "doctor that he should not have an operation. Having "regard to the total failure of the respondent to remember "anything of what took place at the applicants' [the em-"ployers'] doctor's examinations I ought not to rely on his "memory as to their opinion . . . . I think I am entitled "to rely upon the advice of the medical assessor. He takes "the view that the operation would have no effect upon the "condition at all. The operation is not dangerous and I hold "it is unreasonable for the workman to refuse to undergo it." [There was no record in the judge's notes of the evidence of any reference to bombing; only after the examination of the workman by the medical assessor did any reference to bombing appear in the judge's notes of counsel's arguments. A note of the workman's evidence in chief taken by the employers' solicitor contained the passage: "I have been in Watford "two years having had to leave my other house as "result of bombing."] The judge awarded that all payments by way of compensation under the Workmen's Compensation Acts should be suspended, with consequential provision for what was to happen if, after such an operation, the workman was still incapacitated. The workman appealed to the Court of Appeal and the court (MacKinnon L.J., Lord Clauson and Goddard L.J.) dismissed the appeal. The workman appealed to the House of Lords.

Paull K.C. and *Goldie* for the appellant (the workman). The primary duty of the medical assessor, sitting under sch. I, para. 5, of the Workmen's Compensation Act, 1925, is to help the arbitrator to understand and to test the medical evidence. In the course of the case he can always suggest to the arbitrator to ask the medical witnesses certain questions; the arbitrator can also ask him questions, as does the court in the case of nautical assessors. If medical evidence is only called on one side the assessor may advise against accepting the inferences drawn by the witnesses from the facts. If there is a conflict of medical opinion he may advise which opinion he thinks has the greater weight. If the medical opinions on both sides agree he has no right to suggest another conclusion differing from the agreed opinions. It is doubtful whether he has any right to carry out a medical examination of the workman. His presence cannot enlarge the arbitrator's jurisdiction so as to enable him to make any finding of fact on the evidence led which he could not have made if a medical assessor had not been sitting with him. That was what occurred in the present case. [They referred to *Smith* v. *Foster* (1); *Lane* v. *D. D. Leitch & Son* (2); *Woods* v. *Thomas Wilson, Sons & Co., Ld.* (3); *Carpenter* v. *Wandsworth Borough Council* (4); *Fox* v. *Price* (5); *Pensford & Bromley Collieries (1921) Ld.* v. *Filer* (6); and *Hall* v. *British Oil and Cake Mills, Ld.* (7).] The employers failed to prove that the workman was unreasonable in refusing to undergo the operation suggested. The question is not a medical one and should be decided without the medical assessor expressing any opinion on the point. In considering it the workman's own physical and mental idiosyncracies must not be disregarded. No man can be held to be unreasonable in accepting the advice of the doctors consulted by himself unless it can be shown that the advice given must appear unreasonable to a layman of the mentality of the workman. Therefore, if a reputable medical man, a specialist, advises against the operation, the workman cannot be held unreasonable in taking that advice. [They referred to *Steele* v. *Robert George & Co. (1937) Ld.* (8); *Fife Coal Co., Ld.* v. *Cant* (9); *Fyfe* v. *Fife Coal Co., Ld.* (10); and *Laverick* v. *William Gray & Co., Ld.* (11).]

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(1) (1913) 6 B. W. C. C. 498.
(2) (1921) W. C. & Ins. Rep. 273.
(3) (1915) 8 B. W. C. C. 288.
(4) (1917) 117 L. T. 183.
(5) (1926) 20 B. W. C. C. 160.
(6) (1938) 31 B. W. C. C. 105.
(7) (1930) 23 B. W. C. C. 529.
(8) [1942] A. C. 497.
(9) 1921. S. C. (H. L.) 15, 22, 23; 13 B. W. C. C. 449, 457, 457.
(10) 1927. S. C. (H. L.) 103, 107; 20 B. W. C. C. 548, 556.
(11) (1919) 121 L. T. 289.

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Lynskey K.C. and *W. Duckworth* for the respondents (the employers). The arbitrator did not misdirect himself in holding that the workman was unreasonable in refusing to submit to the operation. The questions in this case were primarily questions of fact, and so within his exclusive jurisdiction. His findings cannot be upset unless he misdirected himself or unless there was no evidence for them. [They referred to *Steele* v. *Robert George & Co.* (*1937*) *Ld.* (1).] As regards the examination by the medical assessor, his functions were properly defined in *Woods* v. *Thomas Wilson, Sons & Co., Ld.* (2). He can give his opinion on the events and facts proved, being there to inform the arbitrator's mind of his own medical knowledge. Though there is nothing in the Act providing powers to compel the workman to submit to examination by the medical assessor, such examinations are quite common, and take place in private. They can only take place if the man and his representatives consent; in the present case there was no objection. The medical assessor does not announce his opinion on the examination publicly but the arbitrator usually tells the parties what it is. The fact that this examination took place should not affect the validity of these proceedings. [They referred to *Gracie* v. *Clyde Spinning Co., Ld.* (3) and *Carpenter* v. *Wandsworth Borough Council* (4).]

Paull K.C. in reply.

The House took time for consideration.

Dec. 15. Viscount Simon L.C. My Lords, in the leading judgment, in the Court of Appeal, MacKinnon L.J. (5) described the issue between the parties as involving two questions, first, "whether the proposed operation would "remove the workman's inability to work and restore him to "the condition of a fit man able to earn his living," and the second, "whether the workman had unreasonably refused to "undergo the operation." The first of these two questions does not seem to be quite accurately phrased, for there may be operations which it would be wise for a person to undergo if the success of the operation was probable, even though it was not certain. But the more material question in this case

(1) [1942] A. C. 497, 500.

(2) 8 B. W. C. C. 288.

(3) 1915. S. C. 906; 8 B. W. C. C. 630.

(4) 117 L. T. 183, 185, 186.

(5) (1942) 35 B. W. C. C. 100, 101.

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is that of unreasonable refusal. The learned lord justice correctly states (1) that this question was not a medical one but one " purely for the judge on the evidence, namely the question " whether the workman had unreasonably refused to undergo " the operation," but in arguing this question out, in order to reach his own conclusion, the lord justice appears to depart from this view of the matter and to treat the question as though it were whether the reason advanced by the specialists against submitting to the operation was a good and sufficient reason. The reason, he says (2) " was wholly . . . . based on " the likelihood of its increasing or continuing his neurotic " or hysterical symptoms," and the learned lord justice treats the issue as depending on the validity of this medical view, instead of keeping to the question he had already formulated, viz. whether the workman was unreasonable in refusing to be operated upon. The material question, as this House recently pointed out in *Steele* v. *Robert George & Co.* (*1937*) *Ld.* (3) is not whether the medical advice given to the workman against an operation is more soundly based than advice in favour of it, but whether the workman who refuses to be operated upon is acting reasonably in view of the advice he has received.

The county court judge's judgment makes it clear that he based his conclusion mainly on the advice of his medical assessor, and the medical assessor derived his view from an interview with, and presumably an examination of, the workman. If it had not been for the medical assessor's examination, the judge was apparently prepared to decide in favour of the workman—at any rate he had stopped the argument of the workman's counsel. There is thus raised the exceedingly important question of the proper function and powers of the medical assessor in workmen's compensation cases, and as to this the House must express its conclusion, which will, of course, have an application to many other cases in the future as well as to the present one.

It is necessary to draw a clear distinction between the functions under the Workmen's Compensation Acts of a medical referee and of a medical assessor. Medical referees are appointed by the Home Secretary under s. 38 of the Act of 1925. The statute lays upon them various duties. Under s. 16 a medical referee may in certain circumstances be called on to certify that the incapacity of a workman who is receiving

(1) 35 B. W. C. C. 100, 101.

(2) Ibid. 102.

(3) [1942] A. C. 497.

weekly payments is likely to be of a permanent nature. Under s. 19 a medical referee may be called on to give a certificate as to the condition of a workman and as to his fitness for employment in cases where the previous report of a medical practitioner is not accepted by both sides. The certificate in both these cases is conclusive evidence as to the matters so certified. Under s. 23, sub-s. 3 (*b*), a report may in certain events be required from a medical referee as to the workman's condition. Under s. 43, sub-s. 1 (*f*), a medical referee may be called on to give a decision (which will be final) where the employer, or the workman, is aggrieved by the action of a certifying surgeon in connexion with a certification that the workman is, or is not, suffering from an industrial disease which results in his disablement. And, lastly, under para. 11 of sch. I to the Act: "Any committee, arbitrator or judge "may, subject to regulations made by the Secretary of State "and the Treasury, submit to a medical referee for report "any matter which seems material to any question arising "in the arbitration." Two things are particularly to be noted in connexion with the above list of duties laid on medical referees. In every case the statute, or a regulation made under it, requires the workman to submit himself for examination by the medical referee. And in every case the medical referee after such examination makes a written report or certificate embodying his conclusion. In some cases it is especially provided, and in every case it is plainly implied, that the contents of the report or certificate will be open for the purpose of examination by the parties. Where the report of a medical referee is made under para. 11 of sch. I, the reference to him can only be made after all the medical evidence has been taken (see Regulations as to Medical Referees St. R. & O., 1932, No. 960, para. 36), and it has been held that his report on the case submitted is not to be taken as final and conclusive, but is to be considered along with other evidence before the tribunal (*Dowds* v. *Bennie & Son* (1); *Johnstone* v. *Cochran & Co.* (2). The parties, therefore, in all these cases know what is the question which the medical referee has been asked and precisely how he has replied.

Contrast with this the position of the parties in such a case as the present, where the medical assessor is given no statutory authority to examine the workman and is under no obligation to disclose his opinion after such examination to anyone but

(1) 1902 5 F. 268.

(2) 1904 6 F. 854.

the judge. It is true that a medical assessor, when he sits with a county court judge under para. 5 of sch. I, is himself necessarily one of the panel of medical referees, but that circumstance cannot in itself impose upon the workman an obligation to submit himself for examination by the assessor, and cannot constitute the assessor, however eminent, a sort of unsworn witness who cannot be cross-examined, and whose testimony may be conveyed to the judge in a whisper, or at any rate need not be fully stated to the parties. I am not impressed with the consideration that the workman in the present case did not object to being examined by the medical assessor ; his counsel may well have felt that his case might be seriously prejudiced if he did object. In my opinion, the view of the medical assessor, based on his private examination of the workman, was improperly introduced into the case, and inasmuch as the judge avows that his decision is based upon the medical assessor's advice, the decision cannot stand.

My Lords, I am aware that if your Lordships accept the view which I have presented in this opinion, the House will be condemning a practice which we are told has of recent years become almost universal in county courts when dealing with workmen's compensation cases involving a medical question. We are told that in such cases it is quite common for the medical assessor to make an examination of the workman and to report his opinion to the judge. But to treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross-examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or as to the extent of the difference between apparently contradictory conclusions in the expert field. In *Hall* v. *British Oil and Cake Mills, Ld.* (1), Scrutton L.J., in several passages of his judgment, treats a medical assessor's answers to the judge's inquiries as "evidence," and even

(1) 23 B. W. C. C. 529, 533.

speaks without objection of a medical assessor or a nautical assessor giving "evidence of facts." But I cannot agree that this is within the scope of an assessor's legitimate contribution. Earl Loreburn's judgment in *Woods* v. *Thomas Wilson, Sons & Co., Ld.* (1) puts the medical assessor's functions as high as they can properly be put. Lord Parmoor (2) in that case aptly defines the medical assessor's function as being "not to supply evidence but to help the judge or arbitrator "to understand the medical evidence"—a view in which Lord Parker concurred. It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received. But I propose that the House should definitely lay it down that it is not part of the functions of a medical assessor as such to conduct a personal examination of the workman or to report the effect of the examination and his deductions from it to the judge.

If, as will sometimes be the case, the judge finds himself faced with a difficult decision in-view of the conflict of medical testimony before him, he has the power, under para. 11 of sch. I, at the end of the medical evidence, to submit the medical issue, duly defined, to a medical referee. And inasmuch as the medical assessor is on the panel of medical referees, there may be cases in which it would be convenient and proper for the judge to choose his medical assessor for the purpose. This will involve an adjournment. But it will also involve that the workman is under an obligation to submit to examination; that the reference will define the question upon which a report is required, and will include a statement of the medical evidence that has been given (see Form Q. in the Schedule to the Regulations); and that the report will be in writing and will be available to the parties as part of the materials on which the final arguments and the ultimate decision will be based. Such a report will not, of course, expose the medical referee to cross-examination.

We have been referred to the decision of the Court of Appeal in *Smith* v. *Foster* (3), but the proposition deduced from that decision that the medical assessor may examine the workman and communicate his opinion privately to the judge is wrong and must be overruled. In *Lane* v. *D. D. Leitch & Son* (4),

(1) 8 B. W. C. C. 288, 229.
(2) Ibid. 311.
(3) 6 B. W. C. C. 498.
(4) W. C. & Ins. Rep. 273.

the Irish Court of Appeal refused to interfere where the medical assessor had examined the applicant in the presence of the doctors who had given evidence on either side, but the court pronounced no opinion upon the right of the medical assessor to make an examination and based its conclusion on the grounds that there was other evidence to support the view taken, and that no protest had been raised. I think, however, that the real ground of objection, viz. that the medical assessor is unsworn and cannot be cross-examined, applies in this instance also.

If the only error in dealing with this case was the examination of the workman by the medical assessor and the reliance placed by the judge on the opinion derived from that examination, the proper procedure would be to refer the case back to the county court judge for a re-hearing based on none but proper materials. But there is a further point taken on behalf of the workman which enables the House to dispose of the appeal finally. Even if the medical assessor's opinion were to be included in the matters which the judge had to weigh, there was really nothing before the judge which could support his conclusion that the workman unreasonably refused to undergo the second operation. As I have already pointed out in this opinion, and as has been laid down in this House before, the question whether a workman is unreasonable in refusing to undergo a surgical operation is not to be determined by considering whether the best medical opinion would think such an operation advisable or safe, but by judging whether it is proved that the workman, having regard to all the circumstances (including medical advice offered to him against the operation) was unreasonable in so refusing. I venture to quote a sentence of my own in *Steele's* case (1): " It may in " some cases be quite reasonable for a man to decide not to " undergo an operation if his own doctor advises against it, for it is the conclusion " reached by his doctor which governs " his decision much more than the logic by which his doctor " has reached the conclusion." It is true, of course, that the question to be answered is a question of fact to be decided by the judge on the facts and on the evidence ; but in the present case the county court judge appears to me to have misdirected himself as to what the question of fact is and as to what are the materials relevant to decide it ; and, with all respect to the Court of Appeal, a similar misconception also

(1) [1942] A. C. 497, 500.

appears in their judgments. There was in fact no evidence sufficient to prove that the workman had unreasonably refused to be operated upon, and inasmuch as the burden of proving his unreasonableness lay on the employers, the workman must succeed. I move that the appeal be allowed with costs here and below. An award should be made dismissing with costs the employers' application to review.

Lord Thankerton. My Lords, the opinion just expressed by my noble and learned friend so exactly represents the opinion held by myself that I find it unnecessary to add anything.

Lord Russell of Killowen. My Lords, in my opinion, the learned arbitrator erred in two respects. In the first place, he has allowed himself to be influenced by an alleged fact not proved by the evidence given before him on oath, but apparently imparted to him by the medical assessor as a result of his private interview with the workman. The alleged fact to which I refer is (to quote the judgment) " the fact that the " respondent has suffered from the bombing due to the war " both in London and in Watford." There is no record in the arbitrator's notes of the evidence of any reference to bombing. It is said that a note of the workman's evidence in chief taken by the solicitor for the employers contains a passage to the following effect : " I have been in Watford two years having " had to leave my other house as result of bombing." But this passage, even if proper for our consideration, indicates no bombing at Watford, and was not, apparently, of sufficient importance to deserve a place in the notes of the arbitrator, or indeed in the notes of the counsel representing the employers. It is only after the assessor had returned from his interview with the workman, and the arbitrator had intimated the assessor's opinion, that any reference to bombing, or fear of bombing, or to the fact of bombing at Watford, appears in the arbitrator's notes of counsel's arguments. To me the inference is irresistible, that this alleged fact rests, and rests only, on a statement by the assessor to the arbitrator. That it influenced the arbitrator in adopting the assessor's view is, in my opinion, evident from the words which follow immediately after the passage which I have already cited from the arbitrator's judgment. They run thus : " and the view he " takes is that this disposition of the respondent "—i.e. what the arbitrator had already described as the workman's nervous disposition—" would have taken the same course even if " the minor rupture now present had not occurred at all. He " also draws attention to the fear of going into hospital." The arbitrator then concludes his judgment on this part of the case by saying " It is impossible to link up the alleged neurosis " or the nervous temperament either with the accident or the " operation." As I read the judgment on this point it is based on the view that the alleged neurosis or the nervous temperament is to be linked up, not with the accident or the operation, but with the bombing of which the assessor has informed the arbitrator.

The second respect in which I think the arbitrator has erred is in holding that the workman was unreasonable in refusing to undergo a second operatiom. It is true that this is a question of fact upon which the finding of an arbitrator is conclusive unless in considering it he has misdirected himself, or unless there is no evidence to support the finding. In this case the arbitrator has misdirected himself. Having posed the question which he ought to answer, he has directed his mind in answering it to a different question. The question which he had to answer was whether on the evidence the employers (who were asking for a review on the ground of unreasonable refusal) had discharged the onus which lay on them of proving that this workman was unreasonable in refusing to undergo an operation. As I read the judgment it is merely a statement that the assessor advises that the workman should have an operation, that the operation is not dangerous and that it would have no effect on the nervous condition; and further that he, the arbitrator accepts this advice of the assessor. " He takes the view "—says the arbitrator—" that the operation would have no effect upon " the condition at all. The operation is not dangerous, and " I hold it is unreasonable for the workman to refuse to " undergo it." There is here no consideration of the question whether notwithstanding the advice alleged to have been given by the panel doctor, and notwithstanding the advice contained in the evidence of the two distinguished experts called on behalf of the workman, it was nevertheless upon the facts of this case unreasonable in this workman to refuse to undergo the operation. The only question considered was the correctness of the rival medical views, and the only foundation for the answer of unreasonableness, was the opinion of the arbitrator (founded upon the advice of the assessor) that the advice given on the side of the employers was right and that given on the side of the workman erroneous. My Lords, it was for the employers when they made this application to prove their case. The onus was on them, and in view of the evidence of Dr. Drought and Sir Ambrose Woodall the burden was a very heavy one. It is sufficient to say that they fell a very long way short of discharging it; and if the arbitrator had directed himself to the consideration of the real question which he had to answer, he must have so found. For these reasons I would allow the appeal, and since the employers have failed to establish their claim to a review, it should be ordered that an award be made in favour of the appellant with costs throughout.

I need only add that I concur in the observations of the Lord Chancellor on the subject of the duties, powers and functions of a medical assessor.

LORD MACMILLAN. My Lords, I concur.

LORD WRIGHT. My Lords, I agree so completely with the observations of the Lord Chancellor in this case that I do not desire to add anything; and I agree generally with the opinion which he has delivered.

Appeal allowed.

Solicitor for appellant: *W. H. Thompson.*
Solicitors for respondents: *Carpenters.*

[HOUSE OF LORDS.]

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Oct. 26, 28, 29; *Nov.* 1; *Dec.* 15.

BONITTO . . . . APPELLANT;
AND
FUERST BROTHERS & COMPANY, LIMITED . . . . RESPONDENTS.

Practice—Payment into court—Defence denying liability—Notice of payment in with admission of liability—Defendants not precluded from disputing liability—R. S. C., Or. XXII., *r.* 6.

In an action to recover remuneration for work alleged to have been performed by the plaintiff, the defendants, in their defence, denied liability, but paid a sum of money into court with an admission of liability :—

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* *Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD WRIGHT.

Held, that the terms of the notice of payment in did not preclude the defendants from disputing their liability to the plaintiff at the trial.

R. S. C., Or. XXII. contemplates that the notice of payment in and the defence should not contradict each other and it is irregular for a defendant to deny liability in his defence and admit it in his notice. In this case the plaintiff should have made an interlocutory application to correct the irregularity, when the master or a judge could have had both documents before him. There might be cases in which the duty of getting the two documents reconciled would rest on the defendant.

When money is paid into court with an admission of liability, it does not follow that liability is admitted for the amount paid in and that judgment cannot be given for less. If a judge or jury, in ignorance of any amount paid in, fix a smaller figure, the amount to be awarded remains at that figure. The circumstance that the defendant was willing to pay a larger sum with an admission of liability is only relevant on the question of the costs of the trial.

Dictum in *Davies* v. *Rustproof Metal Window Co., Ld.* [1943] K. B. 299, 300, and repeated in *Harrison* v. *Liverpool Corporation* [1943] 2 All E. R. 449, disapproved.

Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal.

The facts, stated by Viscount Simon L.C., were as follows : The respondents were merchants in the City of London and employed the appellant as manager of their cocoa department. The terms of the appellant's engagement were contained in a written agreement dated January 17, 1940. It described the cocoa department as comprising " the company's dealings " in cocoa." The remuneration of the appellant was agreed to be certain percentages of net profits, and the agreement contained a clause that, in case of any dispute or difference between the parties to the agreement as to the construction thereof, such dispute or difference should be referred to arbitration. In addition to buying and selling cocoa on behalf of the respondents, the appellant was also concerned, on their behalf, in the purchase of very large numbers of bags and quantities of twine for use in shipping cocoa, and in selling a large portion of these on behalf of the respondents. The appellant contended that the work which he did in connexion with these bags and twine was part of his work as manager of the cocoa department, and that under the agreement he was entitled to remuneration at the agreed percentage ,on profits made out of bags and twine as well as on the profits in dealings in cocoa itself. This was disputed by the respondents, and the appellant, accordingly, issued his writ. In paras. 1 to 17 of his statement of claim he put forward the contention above described. In the following paras. 18 to 20 he set up an alternative case on the assumption that his work in connexion with the bags and twine was not covered by the agreement of January 17, 1940, to be paid a reasonable commission on a quantum meruit in respect of this work. In view of the arbitration clause in the agreement, proceedings under paras. 1 to 17 of the statement of claim were stayed in order that the matter might be decided by arbitration, and, pending the award of the arbitrator, further proceedings under paras. 18 to 20 were also stayed. The arbitrator awarded that the appellant was "not entitled to be paid any part of "the profit earned by the respondents from the sale of bags "and twine." There was no request to the arbitrator to state a case. The award having been made, the stay was then removed for the hearing of the alternative case under paras. 18 to 20. By para. 18: "Alternatively if necessary the "plaintiff [appellant] will say that in the premises he is "entitled to be paid a reasonable commission on a quantum "meruit or a contract implied by law arising out of the "conduct or the course of business adopted at all material "times between the plaintiff and the defendant company "[respondents] in respect to dealings in the said bags and "twine and/or to the conduct of the defendant company in "requesting the plaintiff to carry out the said dealings and/or "directing the plaintiff to carry out the said dealings and/or "including the said dealings in the business of their cocoa "department as part of the work to be performed by the "plaintiff in his capacity as manager of the cocoa department "of the defendant company and/or in respect to the employ- "ment by the defendant company of the plaintiff in connexion "with the said dealings in bags and twine." By para. 6 of their defence, delivered on November 12, 1941, the respondents pleaded: "The defendants [respondents] admit that the "plaintiff [appellant] is entitled to reasonable remuneration "for any work in fact done by him on their behalf, other "than as manager of their cocoa department, in connexion "with the said dealings in bags and twine, such reasonable "remuneration being based on the brokerage payable in the "trade." By para. 7: "Save as is above expressly admitted "the defendants deny each and every allegation in the "statement of claim as if the same were set out herein and "specifically traversed." On the same date the respondents gave notice that they "have paid into court 250*l.* and say "that that sum is enough to satisfy the plaintiff's [appellant's] "claim under paras. 18 to 20 of the statement of claim and "admit liability therefor." By para. 6 of his reply the appellant pleaded "that the arbitrator's award in no way "precludes him from contending that his claim to remuneration "in the premises under a quantum meruit entitles him to "be paid on the basis of the remuneration provided under the "said agreement." By para. 7 he pleaded : "The plaintiff "says in regard to para. 6 of the defence herein that said work "and business in connexion with the bags and twine was done "by him as manager of the said department and says no question of remuneration by brokerage arises, nor was it intended "by the parties to be on that basis." At the trial in the commercial court the appellant adduced evidence, through himself and other witnesses, of what was proper and reasonable remuneration to be paid to him for his services in the dealings in bags and twine. Atkinson J., in his judgment, said that the respondents "claim in their defence—at least, I am told "this is what the defence means, although I confess it had not "occurred to me until it was pointed out—that the plaintiff "[appellant] is not entitled to be paid anything for the "services which he rendered in connexion with bags." The learned judge said that para. 6 of the defence meant : "You "are not entitled to be paid a farthing for what you did in "connexion with bags because anything which you did in "connexion with bags was done by you in your capacity as "manager of the cocoa department, and you are therefore "entitled to nothing. All we mean by that paragraph is that "if the true view is that your services were not rendered as "manager of the cocoa department, then you are entitled to "something which ought to be arrived at on the basis of "brokerage." The learned judge construed the arbitrator's award as meaning "that profits from dealings in bags were "not profits of the department, were not within the department, and therefore not within the agreement." Having analysed the evidence, the learned judge held that the appellant was "entitled to be paid by way of reasonable remuneration "for his services in connexion with bags and twine twenty-"five per cent. of the profits" on dealings in them. The respondents appealed and the Court of Appeal (MacKinnon L.J., Lord Clauson and Lewis J.) unanimously allowed the appeal, reversing the decision of Atkinson J. and entering judgment for the respondents. In the leading judgment, Mackinnon L.J. pointed out that the dispute before the arbitrator was whether the appellant was entitled under the written agreement to be paid a percentage of profits earned by dealings in bags and twine as well as a percentage on dealings in cocoa itself or whether, as the respondents contended, the appellant was entitled, under the terms of the agreement, only to a percentage of profits on dealings in cocoa. He further pointed out that the arbitrator's decision in favour of the respondents' contention, whether right or wrong, was final and that the only thing that remained to be decided was whether a quantum meruit claim could be made out. The conclusion inevitably followed from the evidence, especially in view of the appellant's insistence that dealings in bags and cocoa were necessarily combined in the work of the manager of the cocoa department, that the appellant must be treated as having agreed to do transactions in both kinds under his written contract and that he had expressly agreed that his remuneration for doing the whole of these duties would be measured by reference to profits on cocoa alone. The Court of Appeal refused leave to appeal to the House of Lords, but when the attention of the appeal committee of the House was called to the admission of liability in the notice of payment into court, to which there had been little reference in the Court of Appeal, leave was given to the appellant to present an appeal to the House " limited to the issue whether the " payment into court with an admission of liability precludes " the defendants [respondents] in the circumstances from " disputing their liability to the plaintiff [appellant]."

M. Turner-Samuels for the appellant. The respondents' notice admitted liability in respect of the appellant's claim in paras. 18 to 20 of the statement of claim. The word " therefor " referred to that claim. The admission of liability must relate to the cause of action. If money is paid into court either with an admission or a denial of liability and the plaintiff takes it out that is an end of the action. If money is paid in with an admission of liability, and the plaintiff, not having taken it out, fails to obtain a verdict for more than that sum, the defendant will ordinarily be entitled to costs. If the defendant has paid money in with a denial of liability

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the plaintiff, when he succeeds on the issue of liability, though he fails to obtain a verdict for more than the sum paid in, will be entitled to costs on that issue. It, therefore, pays a defendant to admit liability: see *Brown* v. *New Empress Saloons Ld.* (1). Money so paid in also acts as security for the costs to which the defendant is entitled if the plaintiff obtains a verdict for no more than the sum paid in. When money is paid in with an admission of liability the defendant cannot go back on that and judgment cannot be given for a lesser sum: *Davies* v. *Rustproof Metal Window Co., Ld.* (2) and *Harrison* v. *Liverpool Corporation* (3). Once he has admitted liability he has done so for all the purposes of the action. The admission is decisive, and whichever document contains it, whether the defence or the notice, must prevail and controls every other document. Once there is such an admission the issue of liability does not have to be proved. In the present case the decision of the Court of Appeal cannot stand because it completely failed to consider the fact and the effect of the respondent's admission of liability. Its effect was to leave only the question of quantum to be decided and it was not open to the respondents to go to the Court of Appeal on any other matter. [He referred to *Millensted* v. *Grosvenor House (Park Lane) Ld.* (4); *Dumbleton* v. *Williams, Torrey & Field Ld.* (5); *Critchall* v. *London & South Western Railway Co.* (6); *J. R. Mundy, Ld.* v. *London County Council* (7); *Chapman* v. *Westerby* (8); *Hennell* v. *Davies* (9); *Cumper* v. *Pothecary* (10); and *Williams* v. *Boag* (11).]

Paull K.C. and *H. L. Parker* for the respondents. The appellant did not accept the money paid into court. He cannot thus reprobate the payment and afterwards seek to approbate it in the House of Lords. The documents at which the court can look are the pleadings only: see R. S. C., Or. XXII., r. 6. The matter must be determined on the pleadings, and since the notice does not form part of the pleadings, it did not affect the issues to be tried. There being an inconsistency between the notice and para. 6 of the defence, the appellant

(1) [1937] W. N. 156; 106 L. J. (K. B.) 331.
(2) [1943] K. B. 299.
(3) [1943] 2 All E. R. 449.
(4) [1937] 1 K. B. 717.
(5) (1897) 76 L. T. 81.
(6) [1907] 1 K. B. 860.
(7) [1916] 1 K. B. 159, 164, 165; [1916] 2 K. B. 331, 333.
(8) [1914] W. N. 64.
(9) [1893] 1 Q. B. 367.
(10) [1941] 2 K. B. 58.
(11) [1941] 1 K. B. 1.

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should have made an interlocutory application to the master to strike out the notice. The only effect of a bad payment in is that it fails to protect the defendant as regards costs. The basic intention of Serjeant Levinz, who invented the practice of paying money into court, was that "the plaintiff might "proceed at his peril": see *Giles* v. *Hartis* (1).

M. Turner-Samuels in reply. The pleadings and the notice of payment in were not so much inconsistent as ambiguous. The first impression given by para. 6 of the defence is that it is an admission of liability as regards the quantum meruit, and in those circumstances there would have been no justification for asking the court to strike anything out. Atkinson J. had that impression of para. 6. In the course of the trial, when the respondents' counsel sought to dispute liability altogether, he said: "There have been several "applications to me, and this is the first day of the trial, and "until now I have always been told that there was an "admission that the plaintiff [appellant] was entitled to "a quantum meruit." The plaintiff should not be forced, in the face of a notice admitting liability, to put the pleadings through a chemical analysis to find a recondite inconsistency. Further, the judges have an inherent power to deal with anything which is an abuse of the process of the court. It is such an abuse to use the defence to mislead the court into trying a matter, liability having been admitted in another document. If the defence is inconsistent with the notice that is an abuse. If the judge were obliged to follow the pleading, however inconsistent with the notice, that would stultify r. 3 of Or. XXII., doing away with the distinction between payment into court with an admission or with a denial of liability.

The House took time for consideration.

Viscount Simon L.C. My Lords, pleadings are intended to clarify and concentrate the issues in an action. Unfortunately, the present litigation has become complicated by paragraphs which have produced a good deal of unnecessary confusion.

The arbitrator awarded that the appellant was not entitled to be paid any part of the profit earned by the respondents from the sale of bags and twine—taking the view, apparently, that the percentages were to be calculated only on "dealings

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(1) (1697) 1 Ld. Raym 254,255.

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"in cocoa." Whether this is the correct interpretation of the agreement or not is not a matter in issue. There was no request to the arbitrator to state a case and his conclusion is binding both in fact and in law. The award having been made, the stay was now removed for the hearing of the alternative case under paras. 18 to 20. Para. 18 stated the alternative claim in a variety of phrases, separated from one another by the repeated use of the bastard conjunction "and/or" which has, I fear, become the commercial court's contribution to basic English. The whole claim under this paragraph was simply a claim for a quantum meruit. To this claim, the respondents pleaded as follows :—"The defendants admit that "the plaintiff is entitled to reasonable remuneration for any "work in fact done by him on their behalf, other than as "manager of their cocoa department, in connexion with the "said dealings in bags and twine, such reasonable remuneration being based on the brokerage payable to the trade." Although this paragraph professes to be an admission, it is really saying nothing more than that, if the appellant had done any work in respect of bags and twine on the respondents' behalf outside the scope of his employment under the written agreement (which is not admitted), they were willing to pay him for it, adding the contention that the reasonable payment would be a brokerage payment of, I suppose, half per cent. The paragraph is not an admission of liability. The misunderstanding which seems to have arisen in the appellant's mind from this paragraph was greatly aggravated by the fact that at the same time the respondents gave notice to him under Or. XXII. that they had paid into court 250*l*. "to satisfy "the plaintiff's claim under paras. 18 to 20 of the statement "of claim and admit liability therefor." I cannot entertain any doubt that the admission of liability "therefor" means an admission of liability for the plaintiff's claim under paras. 18 to 20, i.e., an admission of liability on the quantum meruit. The appellant, in his reply, however, insisted that his work in connexion with the bags and twine was done by him as manager of the department, and not otherwise, and at the trial he called evidence to support this view. In view of the fact that the arbitrator had already decided that, if the work fell within the written agreement, remuneration for it was covered by a percentage of the profits of cocoa alone, and that the appellant's only chance was to establish that the bags and twine fell outside of his employment under the agreement, this may seem a strange line to take, but I think the explanation is that the appellant wished to repudiate the suggestion that he would be adequately paid by brokerage rates and that he was contending that the proper remuneration on a quantum meruit would be in accordance with the contractual percentages of profit. However that may be, the case came before Atkinson J. in the commercial court in the confused and complicated form which I have described. The learned judge appears to have construed the arbitrator's award as meaning that anything which the appellant did in buying and selling bags and twine must be outside the written agreement, whereas, as I have pointed out above, the arbitrator's decision must be understood to decide (whether rightly or wrongly) that, though transactions in bags and twine were within the agreement, payment under the agreement was a percentage calculated on the profits on cocoa alone. The learned judge's judgment contains a paragraph which shows that he was conscious of the ambiguity created by para. 6 of the defence (of course he did not at that stage know anything of the payment into court and the admission of liability). After a lengthy and careful analysis of the position as he saw it, the learned judge awarded to the appellant twenty-five per cent. of the profits on commodities other than cocoa as fair remuneration. The respondents appealed, and the Court of Appeal unanimously allowed the appeal.

On the only question on which leave to appeal to this House was given, it is first to be observed that the judge who conducts the trial is necessarily concerned to decide the issues disclosed in the pleadings. Until those issues are decided, he has not before him, and he ought not to be informed of, the fact of any payment into court, or of the terms of the notice of such payment. In the present case, therefore, in the course of a long trial in the commercial court, Atkinson J. was dealing with an action in which the defendants denied liability, for that, as I have already pointed out, is the real effect of para. 6 of the defence. The respondents' notice paying 250*l.* into court, on the other hand, contained an express admission of liability, and was, therefore, inconsistent with the defence. Goddard L.J. said on behalf of the Court of Appeal in *Davies* v. *Rustproof Metal Window Co., Ld.* (1) that Or. XXII. "contemplates that the notice should follow the pleading." To be precisely accurate, one should say that the order contemplates

(1) [1943] K. B. 299, 301.

that the notice and the defence should not contradict one another, for notice of payment in may be given before the defence is delivered. In the present case the two documents bear the same date. The necessity of laying down that this is the correct practice is well illustrated by the present case, for it cannot be tolerated that the trial judge should be required to occupy three days with the trial of an issue of liability, with all the expense involved to parties and witnesses, only to be told at the end of it that, in a document which he had not previously been permitted to see, the defendants had admitted liability before the trial began. In *Davies's* case (1), following *Cumper* v. *Pothecary* (2), the Court of Appeal applied the above principle by saying that a defendant is not permitted " to admit liability in his defence " and deny it in his notice of payment into court." The present is the reverse situation, and the proper rule of practice equally is that it is irregular for a defendant to deny liability in his defence but to admit it in his notice of payment in.

The question remains, however, as to how this irregularity should be corrected, when it occurs, and as to what should be the result when, as in the present case, nothing has been done by either side to correct it at all. The appropriate course would be to proceed by means of an interlocutory application. In the commercial court, such a summons often comes before the judge who ultimately tries the case, but that is no reason why the application should not be made to him. As Goddard L.J. pointed out in *Williams* v. *Boag* (3), r. 6 of Or. XXII. only prohibits communication of the fact as to payment in " at the trial." On an interlocutory application a master or a judge can have both documents before him and can make an order which will secure that they do not contradict one another. It would have saved much time, expense and paper if this commonsense procedure had been followed in the present case. Which party should make such an application ? *In Davies's* case (4) it was the plaintiff who took out a summons asking that the notice of payment into court should be set aside as being inconsistent with the defence, and embarrassing, and the Court of Appeal made the order, very much as under the old rules it did in *Critchell* v. *London & South Western Railway* (5). I think that this would have been

(1) [1943] K. B. 299, 301.

(2) [1941] 2 K. B. 58.

(3) [1941] 1 K. B. 1, 3, 4.

(4) [1943] K. B. 299.

(5) [1907] 1 K. B. 860.

the proper course in the present instance, for the plaintiff cannot be permitted to fight the issue of liability on the pleadings, keeping in reserve the defendants' admission contained in another document which is not now part of the pleadings but which will come to the knowledge of the judge only after "all questions of liability and amount of debt or "damage have been decided." I do not, however, exclude the possibility of there being cases in which the duty of getting the two documents reconciled rests on the defendant and where he must accept the responsibility of the consequences, if he does not take steps to remove the contradiction which he has brought about.

Applying these considerations to the present case, the conclusion is as follows:—Atkinson J. necessarily dealt with the issues raised on the pleadings and nothing else. Nothing in the notice of payment in could have any bearing at that stage, for the notice is no part of the pleadings, and the learned judge, under the rules, was not allowed to know of it. Before the Court of Appeal the issues were the same. I do not find in the judgment of the lords justices any reference to the notice of payment in, and should not expect to do so in view of the issues at the trial, though of course there is nothing in Or. XXII. to prevent an appellate court knowing of it. In this House the question has by leave been specially raised whether the admission of liability in the notice entitles the appellant, after all, to succeed on the issue of liability, and the answer is that it does not. The inconsistency is irregular, and should have been corrected at a much earlier stage, but, as matters are, liability was disputed in the defence, that issue has been elaborately litigated, and the decision of the Court of Appeal must stand.

My Lords, as we have had occasion in the course of this appeal to consider the rules of Or. XXII. somewhat minutely, I think it would be proper and useful to point out that it is a mistake to suppose (as was suggested in the judgment of the Court of Appeal in *Davies's* case (1) and repeated in *Harrison* v. *Liverpool Corporation* (2)) that "if money is "paid in with an admission of liability, it follows that liability "is admitted up to the amount paid in and judgment cannot "be given for less." That was, no doubt, the effect of the previous rules, before they were displaced in 1933, but under r. 6 of Or. XXII., as it now stands, the notice of payment into court is not communicated to the judge until not only all questions of liability but all questions of the "amount of "debt or damages have been decided." If, therefore, the judge or jury, in ignorance of any amount paid in, fix a figure of damages which is less than the amount paid in with an admission of liability, the damages to be awarded remain at the figure already fixed. The circumstance that the defendant was willing to pay a larger sum with an admission of liability is only relevant (unless the plaintiff within seven days has exercised his right to take the money out and end the proceedings) on the question of costs of the trial. I move that this appeal be dismissed with costs.

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(1) [1943] K. B. 299, 300.

(2) [1943] 2 All E. R. 449, 452.

LORD THANKERTON. My Lords, I concur.

LORD RUSSELL OF KILLOWEN. My Lords, the only issues in this action which remained for trial after the arbitrator's award were those which were raised by the claim for remuneration under para. 18 of the statement of claim. That was, as I read it, a claim by the plaintiff, outside the agreement of the January 17, 1940, to be remunerated for the rendering of services which were beyond the scope of his duties as manager under that agreement. The answer to that claim is contained in para. 6 of the defence, which I construe as a contingent admission of liability to pay remuneration on a brokerage basis, the contingency being the proof by the plaintiff that he had in fact rendered any such services. By para. 7 of his reply, the plaintiff would seem to admit that the services rendered were within the scope of his duties as manager under the agreement, but counsel in your Lordships' House disclaimed any intention to make such an admission, and the argument proceeded on the footing that the plaintiff was contending that the services in question were not part of those duties. The notice of payment into court, bearing the same date as the defence, admits liability for 250*l.* in respect of the claim in para. 18 of the statement of claim. There is nothing contingent about this admission. In that respect it differs from para. 6 of the defence, but it forms no part of the pleadings, or of the materials available to the judge during the trial. He can only be made aware of the fact of payment into court after he has tried and decided the question of liability and the amount thereof. The fact of payment of a sum into court is then only relevant on the question of costs (Or. XXII.,

r. 6). The plaintiff could have accepted the money under r. 2 of that order in satisfaction of his claim. He elected, however, to proceed with his action. If he felt in any way embarrassed by the discrepancy between the defence and the notice, it was for him to apply to have the two documents brought into line. He took no such step, and the action accordingly proceeded to trial on the issues disclosed by the pleadings. The evidence at the trial was all one way. It was called by the plaintiff and it established conclusively that the services for which remuneration was claimed by the plaintiff fell within the duties which he had to discharge under the agreement, and which were covered by his remuneration thereunder. In these circumstances the Court of Appeal entered judgment for the defendants.

The only question for our consideration is whether, notwithstanding that the plaintiff failed to establish that he had rendered any services for which he could claim remuneration beyond the remuneration fixed by the agreement, the defendants are precluded by their notice of payment into court, with an admission of liability, from disputing their liability to the plaintiff in this behalf. It would indeed be strange if they were bound to pay the plaintiff for services which on the evidence he never rendered, or (to put it in another way) to pay twice over for services rendered as part of his duties as manager under the agreement. In my opinion, however, since the plaintiff did not avail himself of his right to accept the 250*l.* in satisfaction of his claim, but preferred to proceed with his action up to trial and judgment, the notice of payment into court with an admission of liability became irrelevant for any purpose in the action, except for the purpose of assisting the trial judge (after he had decided the question of liability and amount) in the exercise of his discretion as to costs. It did not therefore preclude the defendants from disputing their liability to the plaintiff. I would accordingly dismiss this appeal. I desire only to add that I agree with the Lord Chancellor's view that the trial judge is not bound to give judgment for at least the amount which is paid into court. If he has on the evidence already "decided" that a smaller sum is sufficient to satisfy the liability, I see no reason why he is bound, or indeed entitled, to alter his judgment arrived at on the evidence. The contrary view appears to me inconsistent with Or. XXII., r. 6, which contemplates that the notice shall only be operative on the question of costs. Nor is there any hardship on a plaintiff who refuses to accept the sum paid in because he hopes to get more, and then only succeeds in proving liability for a smaller sum.

LORD MACMILLAN. My Lords, I concur.

LORD WRIGHT. My Lords, I have considered in print the opinion which has just been delivered by my noble and learned friend the Lord Chancellor. I agree with it and merely add a few words on the curious question of practice on which leave to appeal to this House was given. The leave was limited to the question whether the payment into court with an admission of liability precludes the defendants in the circumstances from disputing their liability to the plaintiff. As Goddard L.J. observed in the Court of Appeal in *Cumper* v. *Pothecary* (1): " Payment into court is, and always has been, a matter " depending entirely on statute or rules of court, which have " the force of statute." He adds that the provisions and rules have changed from time to time but the present practice in this respect depends on R. S. C. Or. XXII. in the form in which it has existed since 1933 with a slight amendment in 1934. That order made a change in the practice. Some critics had objected that under the earlier practice a judge might have his mind distracted if he knew from the pleadings that the defendant had paid money into court and how much he had paid in. It was, it seems, proposed by the Rules Committee to meet this objection by providing that the judge should decide the case without being aware that there had been payment into court. The pleadings were not to contain any reference to the payment in, nor was the fact of payment in to be communicated to the judge at the trial. Necessary exceptions were those of a defence of tender before action, which was a defence in the strict sense of the word going to the whole cause of action, and those of pleas under the Libel Acts, 1843, and 1845, where payment into court was an integral part of the defence. Subject to these exceptions, the judge at the trial was under Or. XXII. to proceed in ignorance of the payment into court. But, however desirable that rule might be (though many may feel that judges can be trusted to keep their minds impartial and independent), experience seems to show that the remedy was worse than the disease.

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(1) [1941] 2 K. B. 58, 65.

The purpose of the pleadings is to determine for the judge what issues he has to try. Payment into court (except in the cases mentioned above) is not a defence or an integral part of a defence, but a payment into court may be made after admitting or denying liability in accordance with the prescribed form 3 of Appendix B. The payment in appears only in the notice. Suppose, however, the notice of payment in admits liability for a certain cause of action or to a specific amount, but there is no corresponding admission in the defence, or perhaps actually a denial, how does the matter stand? How is the conflict between the notice and the pleadings to be resolved if they contradict each other? The only possible answer is that the defence must prevail. It is a pleading and is part of the record, whereas the notice is not. On any other view, the judge might after a long trial find for a defendant on a defence denying liability and then be faced by a notice of payment in admitting liability. Or a judge who has assessed the damages in favour of a plaintiff at a certain amount may be faced by a notice admitting liability for a greater sum. Is the judge to tear up his judgment and then give judgment in the terms of the notice of payment into court? Indeed, it is suggested in the present case that this should be done with the careful and elaborate judgment of the Court of Appeal based on a defence which did not admit liability. I think that the only answer possible is that the notice of payment in with an admission of liability does not preclude the respondents from disputing their liability and availing themselves of the success they have achieved in the Court of Appeal by means of the judgment from which on the merits this House refused to give leave to appeal. The judge and the Court of Appeal were bound to decide the case on the record, that is, on the pleadings. The new procedure under the new Or. XXII. cannot be taken to abrogate as by a side wind and inferentially this ancient and fundamental rule of procedure.

It is to be regretted that the House has not the benefit of the opinion of the Court of Appeal in this matter in the present case, but the Court of Appeal have examined Or. XXII. in other cases, and, in particular, in *Cumper* v. *Pothecary* (1), the Court of Appeal in a judgment delivered by Goddard L.J. carefully pointed out some of the changes made by the new rule. The question there was whether the defendant should be allowed to amend his notice of payment in and reduce the amount of the payment, the plaintiff not having within the prescribed seven days taken the amount originally paid in, so that the plaintiff could not get the money out without an order. The court observed that an amendment of the notice of payment in could not be allowed if it produced a want of conformity between the defence and the notice. The notice in that case had denied the damage, which had been admitted in the defence. In *Davies* v. *Rustproof Metal Window Co., Ld.* (1), Goddard L.J., delivering the judgment of the Court of Appeal, stated that " the order contemplates " that the notice should follow the pleading, and it does not " permit a defendant to admit liability in his defence and " deny it in his notice of payment into court,"—he ought also to have added that a defendant cannot deny liability in the defence and admit it in the notice of payment into court. There may however be a possible ambiguity in the words " follow the pleadings." These words do not refer to a temporal sequence, because the payment in may be made before defence. The lord justice, I think, means that the notice and the defence should accord with, and not contradict, each other in regard to admission or denial of liability. In *Harrison* v. *Liverpool Corporation* (2), 50*l.* had been paid into court with an admission of liability. The trial judge decided for the plaintiff and gave judgment for him for 45*l.* 10*s.* The Court of Appeal held that the judge's award of damages was inadequate and entered judgment for 150*l.*, but Lord Greene M.R. added that at least the judge should have awarded 50*l.*, because that amount had been admitted in the notice of payment in. This observation was not material to the decision, but, with the greatest respect, I do not think it is correct in principle, nor, indeed, does it agree with what I understand was the meaning of Goddard L.J. The judge must try the case on the record. Any discrepancy between the defence and the notice of payment in must be embarrassing. The two should be made to agree, but, if the discrepancy is not corrected before the trial, the record must prevail, because that is what determines the issues for the judge, on which he must try the case. In my opinion, there is nothing in this case to preclude the respondents from disputing their liability to the appellant.

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(1) [1941] 2 K. B. 58.

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(1) [1943] K. B. 299, 301.
(2) [1943] 2 All E. R. 449.
(4) Ibid. 452.

Appeal dismissed.

Solicitors for appellant: *H. C. Morris, Woolsey, Morris & Kennedy.*

Solicitors for respondents: *Coward, Chance & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)*

1943

Oct. 25;
Dec. 21.

REID . . . . APPELLANT;

AND

COGGANS OR REID . . . . . . RESPONDENT.

Scotland—Annuity—Bond—Obligation gratuitously undertaken by granter—Annual sum payable to son during life of granter—Annuitant predeceasing granter—Claim on behalf of estate.

A father by a bond gratuitously undertook to pay his son an annuity "during my life." The son predeceased him:—

Held, that the right to payment of the annuity transmitted to the son's estate.

When the instrument conferring the right to an annuity fixes no period during which it is payable the period is limited to the life of the annuitant in all cases where the only alternative is a payment in perpetuity, but when the instrument itself fixes the time this prima facie rule of construction does not apply.

Decision of the Court of Session, sub nom. *Reid's Executrix* v. *Reid*, 1943 S. C. 362 affirmed.

APPEAL from the First Division of the Court of Session.

A bond of annuity was registered in the following terms: "At Edinburgh August 3, 1942, the deed hereinafter re-"produced was presented for registration in the books of the "Lords of Council and Session for preservation and execution "and is registered in the said books as follows: 'I, William "'Reid, ironmaster, residing at Stanfield, Coatbridge, for "'the love favour and affection which I have and bear to my "'son, Robert Reid, residing at One Larch Road, Dumbreck, "'Glasgow, do hereby bind myself to pay to the said Robert "'Reid during my life an annuity of four hundred and eighty

**Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN and LORD WRIGHT.

" ' pounds sterling and that yearly on March 1, 1933, for the " ' year preceding and so forth yearly during my lifetime with " ' a fifth part more of each of the said yearly payments " ' of liquidate penalty in case of failure and the interest of " ' each of the said payments at the rate of five per centum " ' per annum from the term of payment thereof during the " ' not-payment of the same ; and I consent to registration " ' hereof for preservation and execution. In witness whereof " ' these presents are subscribed by me at Coatbridge on " ' February 24, 1933, before these witnesses Robert Dunholm " ' and William Fuller Anderson, both solicitors in Coatbridge . . . .' And the said Lords grant warrant for all " lawful execution hereon." The son died on November 5, 1940, leaving a widow, Evangeline Reid (formerly Coggans), the respondent, surviving. In an action against William Reid, the appellant, she claimed declarator that he was bound to pay her as executrix dative the annuity during his lifetime. The Lord Ordinary, Lord Robertson, decided in favour of the appellant, holding that his obligations terminated on the death of his son. On a reclaiming motion this decision was reversed by the First Division of the Court of Session (Lord President Normand, Lord Fleming and Lord Moncrieff, Lord Carmont dissenting). The appellant appealed to the House of Lords.

Sir David Murray S.-G. and *MacInnes* (both of the Scottish Bar) for the appellant. The obligations of the appellant under the bond terminated on the death of the annuitant. There is no case in which an annuity granted by a living person has been continued after the annuitant's death. This is not a testamentary instrument but a gratuitous deed inter vivos. In such a case, unless it can be clearly shown that the words extend the right beyond the death of the grantee, their effect must then cease. This deed must be construed contra proferentem. It must be read in its ordinary and natural meaning, and " annuity " in the ordinary sense connotes a payment enduring for the life of the annuitant. Any ordinary person reading this document would read it as an undertaking by a father to pay a sum to his son during the son's life. (The grant was actually made for " love favour and affection.") The judges of the First Division reached the conclusion they did out of loyalty to certain authorities depending on wills, but the construction they adopted was entirely artificial. It would only be correct if

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there were added to the deed some such words as "his "executors, administrators and assigns" or "his representatives." The grant is limited to the life of the grantee, despite the express limitation to the grantor's lifetime. An annuity limited to the life of the grantor is not to be treated as an annuity pur autre vie. There is no reported decision on this point. [They referred to *Hill* v. *Hill's Tutors* (1); *Young's Trustees* v. *Shelton's Executors* (2); *M'Donald's Trustees* v. *M'Donald's Executors* (3); *Neal* v. *Hanbury* (4); *Savery* v. *Dyer* (5); *In re Ord. Dickinson* v. *Dickinson* (6) and *In re Morgan. Morgan* v. *Morgan* (7).]

Mackintosh K.C. and *Guthrie* (both of the Scottish Bar) for the respondent. According to the terms of the bond the annuity was payable during the lifetime of the appellant and to restrict it to the lifetime of the grantee would contradict the terms of the bond. The matter to be determined depends solely on its construction. The bond is unilateral and as much a soliloquy as a will. The words "love favour and affection" are conveyancing words in Scotland merely indicating that the deed is gratuitous and they are not put in for any personal reason. The words "during my life" are as much an essential part of the grant as any others. If the appellant's construction were correct, apt and unambiguous words could have been found in the law of Scotland, e.g.," during the joint lives of "myself and my said son." A mere grant of an annuity to the son without any qualification would have ceased with his death but the words "during my life" make all the difference. The principles relating to an annuity pur autre vie apply even when the life is not that of a third party but is that of the grantor. This deed is a legally drawn document and there is no question of reading "annuity" as having a popular as distinct from its legal meaning; the context in this case displaces the primary meaning: see *In re Cannon. Cannon* v. *Cannon* (8). The words of the deed mean what they say and create an obligation during the life of the appellant. If the son is not there to take the payments his legal personal representatives do.

(1) (1866) 5 Macph. 12.
(2) 1937 S. C. 28.
(3) 1940 S. C. 433.
(4) (1701) Prec. Ch. 173.
(5) (1752) Amb. 139.
(6) (1879) 12 Ch. D. 22, 25.
(7) [1893] 3 Ch. 222.
(8) (1915) 114 L. T. 231, 232.

Sir David Murray S.-G. in reply. It is inherent in the nature of an annuity that it should die with the annuitant and it requires very clear language to displace that.

The House took time for consideration.

VISCOUNT SIMON L.C. My Lords, the question here is as to the proper construction of an inter vivos bond entered into by a father, William Reid, the appellant, in favour of his son Robert Reid. What we have to decide is whether the son's widow, the respondent, is entitled to be paid by her father-in-law annually the sum of 480*l*., notwithstanding that her husband is dead, so long as the defender is alive. The Lord Ordinary (Lord Robertson) came to the conclusion that the claim failed. He pointed out (1) that the grant of an annuity to A. B., without any further qualification, unquestionably confers on A. B. a right to the periodic payment which terminates on A. B.'s death, but that when the grant is inter vivos, the obligation to continue the payment continues to attach to the grantor's personal representative in the event of the grantor predeceasing the annuitant. He drew the conclusion that the qualification in the bond that the payment should be made only during the father's life had the effect of stopping the payments when the father died without extending them beyond the son's death. In the Court of Session Lord Carmont took the same view, but the majority of the Court (Lord President Normand, Lord Fleming, and Lord Moncrieff) held that the pursuer succeeded, holding that the presumption that an annuity, granted without any further qualification, terminates on the grantee's death was overcome by the express term that it is to be paid during the life of the grantor.

My Lords, after considerable reflection, I have come to the conclusion that the decision of the Court of Session is correct. An " annuity " means an annual sum, and the period for which this annual sum has to be paid must be gathered, in the light of the relevant facts, from the language of the instrument conferring it. Where no period is fixed in the instrument itself during which the annual sum has to be paid, the court would without question hold that the period of such payment was limited to the lifetime of the annuitant in all cases where the only alternative is a payment in perpetuity. And this for a very good reason. If the payment has to be made in

(1) 1943 S. C. 362, 363.

perpetuity, the distribution of the estate of the testator (where the annuity is given by a will and is, as usually happens, a charge on the whole estate) or of the estate of the covenantor after his death (where the annuity is secured by covenant) will be held up for an indefinite time, unless the court is in a position to authorize the executors to retain a sum to secure the annuity and distribute the rest (as in *Harbin* v. *Masterman* (1).) Even so, the sum retained would have to be held by the legal personal representatives, or by the court, in perpetuity. No court would willingly attribute to a testator or covenantor the intention of bringing about such a state of things. These, I think, are the considerations which explain the observation of Lord Hardwicke L.C., when sitting in the Court of Chancery in *Savery* v. *Dyer* (2), that " if one gives by " will an annuity . . . . to A., A. shall have it only for life ; " for if A. might give it to his executors, it might go from " executors to executors for ever." It may, therefore, be properly and accurately said that, where no time for the duration of the annual payments is fixed by the instrument that creates the annuity, the time is to be presumed to be the life of the annuitant. But where the instrument itself fixes the time, as it does in the present case, there is no room for the application of this prima facie rule of construction. The plain words of the instrument must prevail and no implication to the contrary arises. I move that the appeal be dismissed, with costs.

Lord Thankerton (read by Lord Wright). My Lords, the only question at issue is whether, on a proper construction of the bond, the appellant's obligations thereunder terminated on the death of Robert Reid, or continue to be enforceable by the respondent as his executrix. My Lords, I am of opinion that the decision of the First Division was correct, and I agree with the reasons given by the majority of the learned judges of the First Division, that there is here an effective reference to a term other than the life of the annuitant, and that that term is the measure of the endurance of the right. The dissentient judges, the Lord Ordinary and Lord Carmont, both appear to me to have wrongly assumed that the words " during my " life " and " during my lifetime " are necessarily added or qualifying words, whereas they appear to me to constitute an express statement, and the only statement, of the period of

(1) [1896] 1 Ch. 351.

(2) Amb. 139, 140.

duration of the obligation. This view is confirmed by an important consideration which is not dealt with in either of the courts, and that is the nature and purpose of such a bond in Scots law.

This bond is a formal bond with a consent to registration for execution, which will warrant summary diligence. As is proper, it is drawn by a skilled lawyer, whom we are entitled to credit with a knowledge of the requisites necessary to render such a bond effective. " It need scarcely be said that in " every case to warrant summary diligence, the bond must be " ex facie regular and the debtor's obligation clear and specific. " If the obligation is in any way indefinite or requires something to be ascertained judicially before execution can be " done, summary diligence is incompetent. The bond must " of course be probative." (Stewart on Diligence, p. 413.) " It is important to observe the distinction between a bond " as the groundwork of summary execution, and as the " groundwork of an action. The difference of effect practically " is, that summary execution, besides avoiding delay and " expense, cannot be questioned or suspended without finding " caution ; while there is no such necessity in defending " against an action. For summary execution, the obligation " must be so certain and precise, that it may at once be " enforced without further enquiry." (Bell's Principles, s. 68. In his Lectures on Conveyancing, Professor Montgomerie Bell after dealing with the clause of consent to registration for execution as a common clause in most deeds, including personal bonds (3rd ed., vol. I., pp. 220–4), deals with bonds of annuity as follows (vol. I., p. 272) : " Bonds of annuity may be " granted in consideration of a price paid down, or for love " and favour, or, generally, for good and sufficient causes and " considerations. When a price is paid, the amount must be " specially set forth, in compliance with the provisions of the " Stamp Acts. The receipt of it will be acknowledged and " discharged, and in all cases the obligant will bind himself and " his heirs, in usual form, to pay to the annuitant the amount " of the annuity, at such terms or days as may be arranged, " during the lifetime of the annuitant, or for such length of " time as may be agreed on, with penalty in case of failure, " and interest, as usual in regard to money obligations."

In the recent Scots Style Book, vol. I., p. 283, there is a style for " Bond of annuity for life, granted in consideration of " a price paid, and without any security beyond the grantor's

" obligation." It is as follows :—" I, A. B., in consideration of " the sum of £ sterling instantly paid to me by C. D., " do hereby bind myself and my heirs, executors, and representatives whomsoever, all jointly and severally, without the " necessity of discussing them in their order, to pay to the said " C. D. during all the days of his lifetime a free liferent annuity " of £ sterling, and that at two terms in the year, " Whitsunday and Martinmas, by equal portions, beginning " the first payment at Whitsunday 1902, of a proportion of " said annuity corresponding to the period from the date " hereof (or from the day of) to that term, " and the next payment at Martinmas 1902 for the half-year " preceding, and so forth half-yearly, termly, and proportionally thereafter during the lifetime of the said C. D. . . . " In witness whereof." The form given in the Juridical Styles, vol. II., p. 326 et seq., is materially identical. The bond here in question is clearly formal and uses common words of style ; its frame consists of two parts, the first part consisting of a general description of the obligation, and the second part, which begins with the words " and that by," is exegetical of the first part and is intended to define precisely, for the purposes of summary diligence, the periodical amount and the duration of the pecuniary obligation, along with the usual clause as to interest and penalties. This is the common frame of such a bond, and, for present purposes, it makes no difference what the consideration is. The only statement of a terminus ad quem is the twice repeated " during my lifetime " which is clear and unambiguous and apt to warrant summary diligence, and I can see no justification for any implication which would qualify these words. The word " annuity " means an annual payment, and any implication which might arise in the absence of any express statement of the terminus ad quem, is irrelevant in the presence of such a statement, as not only would the implication qualify and alter the express statement, but it would render the bond inapt as a warrant for summary diligence. For this reason I am of opinion that the cases cited as to construction of testamentary deeds, and the English authorities cited, are of little assistance in the present case. Further, in my opinion, it has been wrongly assumed that the words " during my life " and " during my lifetime " were added words. It is much more likely, having regard to the passage from Bell's Lectures and the Styles, that the alteration of the style consisted in the substitution of " my " for " his " in the middle of these words, which would mean that the grantor's lifetime superseded and took the place of the annuitant's lifetime as prescribing the duration of the obligation. I am, therefore, of opinion that the terms of the bond are clear and unambiguous, and that there is no justification for holding that the duration of the grantor's obligation is other than the period of the grantor's lifetime. In my view, it is impossible to find in the language of this bond—as Lord Carmont did (1)—that the obligation was " to continue only during the joint lives of the grantor and " grantee." If the legal draughtsman had so intended, I cannot imagine that he would have omitted the use of such a familiar term. For the reasons that I have ventured to express, I agree with the conclusion of the majority of the learned judges of the First Division that the appellant's obligation continues during his lifetime, and the appeal fails.

LORD RUSSELL OF KILLOWEN. My Lords, I would dismiss this appeal. I agree with the interlocutor pronounced by the First Division, and with the reasons given by the majority of the judges. The sole question is what is the meaning to be attributed to the language used in the bond, the relevant words of which are as follows : " I, William Reid, ... for " the love favour and affection which I have and bear to my " son Robert Reid . . . . do hereby bind myself to pay to the " said Robert Reid during my life an annuity of four hundred " and eighty pounds sterling and that yearly on the First " day of March in each year beginning the first payment thereof " on the First day of March nineteen hundred and thirty-three " for the year preceding and so forth yearly during my " lifetime." In reaching a conclusion on this point we can only be guided by the wording of the bond. We must not start with any assumption or surmise of probability of intention on the part of the executant. His intention must be gathered from the words of the document. Both the Lord Ordinary and Lord Carmont have, I think, started with the assumption that the intention was to grant a life annuity to his son, and that the reference to the father's own life was inserted only for the purpose of reducing that life annuity to something less, and ending it in the event of the father dying in the lifetime of the son. I cannot accept this view. It appears to me to be contrary to the language of the bond. The reference

(1) 1943 S. C. 362, 369.

to the life of the father does not purport to be inserted as a qualification or limitation of a gift of a life annuity. It is part and parcel of the gift itself, the gift being the creation of a liability of the father to the son to pay to him during the father's life an annuity of 480*l*.

With all deference to those who entertain a different view of the construction of this bond, I think it is wrong to approach the problem from the starting point that the words in the bond " an annuity " mean an annuity for the life of Robert, and then to proceed to treat the reference to the fathers life as a qualification or cutting down of that life annuity. The word " annuity " means an annual sum, the duration of the payment of which will vary according to the terms of the document which creates it. Thus it may be an annual sum payable in perpetuity, or during the life of the grantee, or during a life other than that of the grantee, or during joint lives, or during a term of years or during some other defined period.

Two propositions in relation to annuities have been established by authority many years ago, and have been acted upon and have governed titles to annuities ever since. The first is that a grant of an annuity to A. with no other context to assist, is to be construed as being an annuity which ends with A.'s life; the reason being as explained by Lord Hardwicke L.C. in *Savery* v. *Dyer* (1) that the only possible alternative was the view that it was to be paid for ever. In that case the gift which was under consideration was a gift by will of an annuity to A. during the life of the testator's executor. A. having died during that life, it was held that the annuity did not cease to be payable on A.'s death, but passed to his executor. This established the second proposition, viz., that where some period, which is not the life of the grantee, is specified as the period during which the annual sum is payable, the annual sum continues to be payable to the executors of the grantee in the event of the grantee dying during that period. The context no longer permits the view that the payment is confined to the lifetime of the grantee. These two propositions are well settled in English law. It will be sufficient to quote from the judgment of Sargant J. in the case of *In re Cannon. Cannon* v. *Cannon* (2), in which he said: " Prima facie when an annuity is given it is only for the life " of the annuitant, but if another term for payment is pointed

(1) Amb. 139, 140.

(2) 114 L. T. 231, 232.

"out, then that term is not inserted by way of restriction to "the period of the annuitant's life, but is in substitution for "that period. This was decided long ago in *Savery* v. "*Dyer* (1)." They are equally well settled in the Scottish courts: see *Young's Trustees* v. *Shelton's Executors* (2) and *M'Donald's Trustees* v. *M'Donald's Executrix* (3).

It is said, however, that the case is different if in the grant of an annuity pur autre vie the other life is the life of the grantor, and that no reported case can be found which deals with such a grant. It is true that, so far as I know, the reported cases, and certainly all those cited to us, are cases of gifts by wills in which the other life cannot be the life of the grantor; but I can see no reason why the fact that the other life in the case of a gift inter vivos is the life of the grantor should make any difference in the construction of the gift. Nor can I see any reason why the construction of the gift of an annuity inter vivos should differ from the construction of such a gift by will. Nor does the absence of reported authority cause me surprise. Wills are often home-made. Deeds creating annuities are not. They are normally prepared by skilled draftsmen, who if instructed that the annuity was to cease on the death of either the grantee or the grantor would adopt the common form of creating an annuity for their joint lives. For myself, I find it difficult to understand how the appellant can escape liability without in some way rewriting the bond. His contention is that the son's annuity is for the son's life; if so then the bond runs thus:—"I bind "myself to pay to my son during my life an annuity during "his life," a piece of drafting which I venture to say creates (if the appellant's contention is correct) a liability which is nonsensical and impossible of fulfilment, for if the son dies first the sum is not paid during the grantor's life, and if the grantor dies first the sum is not paid during the son's life. The truth is that the result desired by the appellant can only be reached by rewriting the bond and providing for the payment of an annuity during the joint lives of the father and son. The bond is clearly not a home made document, and the draftsman instead of confining the payment to the familiar conveyancing period of joint lives, has defined the payment as one which is to continue during the lifetime of the father. The construction which the First Division has attributed to

(1) Amb. 139.

(2) 1937 S. C. 28.

(3) 1940 S. C. 433.

the bond is one which is consonant with the wording of the document unaltered in any respect. It was indeed suggested that the words "his executors administrators and assigns" or "his representatives" or some similar words ought to have been added after the son's name; but such an addition would only have been an unnecessary statement of the operation in law of the bond if the construction in question is adopted.

My Lords, but for the fact that in this case a difference of opinion exists in the Scottish courts, I would not have troubled your Lordships at this length. I would have been well content to rest my vote on the reasons given by the Lord President and Lords Fleming and Moncrieff. My respect for the opinions of those who take a different view of the construction of this document is my justification for stating in my own words the reasons why I think that this appeal should fail.

LORD MACMILLAN (read by LORD RUSSELL OF KILLOWEN). My Lords, by a bond of annuity the appellant, William Reid, bound himself during his lifetime to pay to his son Robert an annuity of 480*l*. The son has died but the father survives. The question is whether the father is liable to continue paying the annuity to the respondent who is the son's executrix. The obligation, it will be observed, is to pay the annuity to the son without mention of his representatives. The general principle is that heirs "have right, not only to obligements "conceived in favour of the defunct and his heirs, but, though "there be no mention of heirs, unless, by the nature of the "obligement, there be a speciality, appropriating the same to "the person of the defunct only" (Stair, Inst. III. 5, 5). It is agreed on all hands that in the case of the grant of an annuity there is "a speciality appropriating the same to the "person of the defunct only," unless there is a context necessitating a contrary interpretation. This is because an annuity is prima facie presumed to be only for the life of the annuitant.

In the present case the fact that the appellant undertook to pay the annuity "during my lifetime" is said to extend the appellant's obligation beyond the life of the grantee of the annuity. If speculation were permissible, it is, to say the least of it, not improbable that by the introduction of the words "during my lifetime" the appellant intended, not to expand his son's rights, but rather to prevent the obligation to pay the annuity from binding his own representatives, as without these words it would have bound them. This is the view taken by the Lord Ordinary and by Lord Carmont, and the fact that the appellant has maintained it throughout these proceedings indicates that it was also the appellant's own view of what he meant. But speculation is not permissible and the extent of the appellant's obligation must be determined by the language which he has used, not by surmise as to what he intended. This is a formal document prepared by the appellant's legal advisers and framed with the precision appropriate to a bond which contains a consent to registration for execution, rendering it on registration " in effect and execution, the same as a decreet " in absence " Ross's Lectures, 2nd ed., Vol. I., p. 120). The initial words of obligation are expanded and given the requisite exactitude by the detailed clause which follows, in which the appellant undertakes to pay the annuity on a certain day in each year " and so forth yearly during my lifetime." I cannot read these words as meaning anything other than what they say.

While it is true that an annuity is in the ordinary case for the life of the annuitant, this is by no means always so. As the writer of the article on Annuities in the Encyclopædia of the Laws of Scotland points out, " an annuity may exist " during the life of the grantor, or of the grantee, or of any " third party ; or during the joint continuance of any number " of lives ; or during the longest of any number of lives " (Vol. I., § 897). It all depends on the terms of the instrument creating it. In the present instance, if the appellant instead of binding himself to pay the annuity " during his lifetime " had bound himself to pay it for twenty years, I do not doubt that he would have been bound, if his son had died within the twenty years, to go on paying it to his son's representatives until the expiry of the twenty years. I cannot see any ground for reaching a different conclusion where the obligant binds himself to pay the annuity yearly during his lifetime. I am accordingly in favour of dismissing the appeal.

Lord Wright. My Lords, the short point of construction to be determined in this case has given rise to marked difference of high judicial opinion. For myself I am constrained to agree with their Lordships of the First Division. The issue is whether the annuity terminated on the death of Robert Reid or whether it transmitted to his executrix.

The first question is whether the annuity was personal to

Robert Reid as being intended for his personal maintenance and enjoyment. In support of the view that it is to be so regarded it is said that it was from a father to his son and that the grant is actually prefaced by the recital that it is made for "love, favour and affection." But in my opinion these expressions are formal words often found in a gratuitous benefaction and do not in themselves show an intention to limit the grant to the son personally or to exclude its transmission to his personal representatives on his death. There are no facts in evidence which would justify a finding that the annuity was intended to be personal to the grantee. The court has no right to guess at the grantor's intention. Nor do I think that the word "annuity" by its inherent import indicates that the annual payment, though described as an annuity, is limited to the life of the annuitant. The word prima facie connotes, I think, simply an annual payment. It is true that where an annuity is granted to a named annuitant without any express limitation, it will generally be taken to cease on the death of the annuitant. So it was held in England long ago by Lord Hardwicke L.C. in *Savery* v. *Dyer* (1). But, as Lord Hardwicke explains, this is so because if the grantee might give it to his executors "it might go from executors to executors for ever." Lord Hardwicke was there it is true dealing with a gift by will of an annuity granted during the lifetime of the testator's executor. He held that the annuity did not cease on the grantee predeceasing the testator's executor, but transmitted to the grantee's executor. The restriction to the grantee's lifetime was only by implication. Lord Hardwicke said "as the testator has given an express limitation, it destroys "that implication." That decision no doubt had reference to a testamentary disposition which could only take effect on the testator's decease. But in my opinion it shows that an annuity expressed to be payable to a kinsman may transmit to the kinsman's executor and it also states the reason why an annuity which would otherwise cease on the annuitant's death, continues and is payable to his executor, if there is a definite limitation other than the annuitant's death. The express limitation prevails over the limitation which is merely implied.

The appellant's argument sought to meet this way of approaching the question (apart from the distinction sought to be drawn between a testamentary disposition and an obligation by bond) by starting with the premise that in a case like this the general rule that the grant was limited to the grantee's life still remained in force notwithstanding an express limitation to the grantor's lifetime. Thus, it was said, in consequence of combining the express and the implied limitation, the grant was to be construed as being for the joint lives of grantor and grantee. This would obviously not be so in the case of a testamentary disposition, and to that extent the testamentary disposition is different from a grant by deed. But in my opinion this difference does not affect the true principle, which is that the express limitation supersedes the implied limitation. The term of the grantor's life is in substitution for the term of the annuitant's life, if I may adopt the words of Sargant J. in *In re Cannon* (1). That indeed was a will case, like a number of other authorities to the same effect which have been referred to. But the general principle is in my opinion that the implied limitation to the particular annuitant's lifetime is superseded (apart from special cases, as where the annuity is merely personal) where another specific limitation is expressed, whether that express limitation be the donor's lifetime, or a fixed period, or the lifetime of a person, other than the annuitant or any similar specified period. Any fixed term of years would be inconsistent with a limitation to the period of the annuitant's life, because that might be either longer or shorter than the specific limitation which is expressly fixed. I can see no reason for distinguishing a period to be ascertained by the death of the grantor from any other definite term. The gift here is expressed to be for an annuity during the grantor's lifetime. To convert that defined period into a different period, namely, the joint lives of grantor and grantee, is in my opinion to rewrite the terms of the bond and turn it into an annuity for joint lives instead of one for the single life of the grantor. That I think is not, as a matter of construction, competent. On the express language of the bond it is simply a grant pur autre vie, because in my opinion, " autre vie " in this context means any life other than the annuitant. I cannot avoid this conclusion unless I hold that the grant is personal to the annuitant, a view which I have already rejected.

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(1) Amb. 139, 140.

It is curious that, as the Lord President observes (2), there is no English case which has decided that an annuity payable

(1) 114 L. T. 231, 232.

(2) 1943 S. C. 362, 366.

under contract or deed is during the obligant's life to be dealt with as an annuity pur autre vie. But I agree with him that the authorities, both Scottish and English, which he cites, state principles applicable to the present case. I need not repeat the citations. Indeed I should be content simply to express my concurrence in every substantial respect in the judgments of the Lord President, Lord Fleming and Lord Moncrieff but for the difference in this case of high judicial opinion. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Abbott, Anderson, Braithwaite & Whittaker, for Simpson & Marwick, W.S., Edinburgh, and J. & J. Gartshore Scott, Glasgow.*

Solicitors for respondents: *Druces & Attlee, for Macpherson & Mackay, W.S., Edinburgh, and John W. & G. Lockhart, Ayr.*

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CORDON-CUENCA . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR, SPECIAL COURT, UNDER THE TRIAL OF SPECIAL OFFENCES ORDINANCE, 1943.

Gibraltar—Defence regulations—Offence—Conviction—Special court—Jurisdiction—Defence Regulations, 1939 *(Gib.), reg.* 23*—Trial of Special Offences Ordinance,* 1943 *(Gib.), para.* 2*—Emergency Powers (Defence) Act,* 1939 *(U.K.)* (2 *&* 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-s.* 2; *s.* 4*—Emergency Powers (Defence) (No.* 2) *Act,* 1940 *(U.K.)* (3 *&* 4 *Geo.* 6, *c.* 45), *ss.* 1, 2.

Appeal to Privy Council—Criminal matter—Special leave—Appeal Order in Council, Gibraltar, 1909, *St. R. & O.,* 1909, *p.* 794.

The power conferred by the Emergency Powers (Defence) (No. 2) Act, 1940, of the United Kingdom, to appoint special courts to try offences created by defence regulations made pursuant to the Emergency Powers (Defence) Act, 1939, is permissive and not obligatory, and does not confine the trial of those offences to such special courts nor compel their creation for that purpose. The offences can be tried by any court exercising

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**Present:* Viscount Simon L.C., Lord Atkin, Lord Porter, Lord Clauson and Sir George Rankin.

jurisdiction either as a result of the powers conferred by the Act of 1940 or under any other lawful authority. Accordingly, a special court appointed under the Trial of Special Offences Ordinance, 1943, of Gibraltar, made by the Governor under the authority of Letters Patent empowering him to make laws for the peace, order and good government of Gibraltar, which convicted the appellant of an offence against reg. 23 of the Gibraltar Defence Regulations, 1939, made under the Emergency Powers (Defence) Act, 1939, as applied to Gibraltar by order in council, was validly constituted and had jurisdiction to try the appellant.

The order in council regulating appeals to His Majesty in Council from Gibraltar does not authorize the granting of leave to appeal in a criminal matter. In such cases special leave to appeal must be given by His Majesty in Council.

Chung Chuck v. *The King* [1930] A.C. 244, applied.

Judgment of the Supreme Court of Gibraltar Special Court affirmed.

APPEAL (No. 35 of 1943), by special leave, from a judgment of the Supreme Court of Gibraltar, Special Court (August 25, 1943), whereby the appellant, Luis Lopez Cordon-Cuenca, was found guilty of treachery by acting with intent to help the enemy contrary to reg. 23 of the Defence Regulations, 1939, of Gibraltar, and was sentenced to death.

The question in this appeal was whether the special court which convicted the appellant was validly established and had jurisdiction to try him. The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellant was convicted before the Chief Justice of Gibraltar (McDougall C.J.), sitting as a special court without a jury, under the provision of para. 2 of the Trial of Special Offences Ordinance, 1943 (Gibraltar), for an offence against reg. 23 of the Gibraltar Defence Regulations, 1939. That Ordinance was made by the Governor under the authority of Letters Patent empowering him to make laws for the peace, order and good government of the city and garrison of Gibraltar, and para. 2 of the Ordinance enacted that " Where any person shall have been committed for trial " before the Supreme Court in respect of an offence alleged to " have been committed, whether before or after the coming " into force of this Ordinance, against Regulation 23 of the " Defence Regulations, 1939, the Chief Justice shall appoint " and hold a special court for the trial of such cause and such " trial shall have the same validity in every respect as if it " had taken place at the time at which it would have been " held in due course." Regulation 23, at the relevant date, was in the following terms : " If, with intent to help the enemy, " any person does, or attempts or conspires with any other " person to do, any act which is designed or likely to give " assistance to the naval, military or air operations of the " enemy, to impede such operations of His Majesty's forces, " or to endanger life, he shall be guilty of felony and shall on " conviction on indictment suffer death."

The power to make defence regulations for Gibraltar was derived from the Emergency Powers (Defence) Act, 1939 (2 & 3 Geo. 6, c. 62), of the United Kingdom. That Act authorized the making by order in council of defence regulations for the United Kingdom for securing the public safety, the defence of the realm, the maintenance of public order, and so forth, and by s. 1, sub-s. 2, enacted that Defence Regulations may " (*a*) make provision for the apprehension, trial and " punishment of persons offending against the regulations." Further, by s. 4 of the Act, His Majesty might by order in council direct that the provisions of the Act should extend, with the modifications specified in the order, to any colony. That was done by an order in council of August 25, 1939 (the day after the statute of 1939 became law)—St. R. & O., 1939, No. 968—as a consequence of which the Governor of Gibraltar was empowered to make defence regulations for the colony. But the Act nowhere enabled those defence regulations to make provision for the trial by special courts of those offenders who were not subject to the jurisdiction of courts martial. That omission was cured by the U.K. Emergency Powers (Defence) (No. 2) Act, 1940 (3 & 4 Geo. 6, c. 45), an Act the purpose of which was stated to be " to remove doubts as to the extent " of the powers which may be exercised by His Majesty under " the Emergency Powers (Defence) Act, 1939." After reciting that " by the Emergency Powers (Defence) Act, 1939, His " Majesty was enabled to exercise certain powers for the purpose " of meeting the emergency existing at the date of the passing " of that Act," but that " the said powers did not enable " provision to be made for the trial by courts martial of " persons not being subject to the Naval Discipline Act, to " military law, or to the Air Force Act," and that " by reason " of the development of hostilities since that date it had " become expedient to remove doubts as to the extent of the " said powers in order to secure that provision for the trial " of such persons by special courts may be made where " necessary," the statute enacted that " the powers conferred "on His Majesty by the Emergency Powers (Defence) Act, "1939 (hereinafter referred to as 'the principal Act') to make "by Order in Council such Defence Regulations as appear to "him to be necessary or expedient for securing the public "safety . . . . include power to make provision for securing "that . . . . persons . . . . may, in such circumstances as "may be provided by the Regulations, be tried by such special "courts . . . . as may be so provided," and further enacted that :—"(2.) After para. (*a*) of sub-s. 2 of s. 1 of the principal "Act there shall be inserted . . . . '(*aa*) make provision "' . . . . for their' [i.e. offenders] 'trial by such courts, "' . . . . and in accordance with such procedure as may be "'provided for by the Regulations . . . ., so, however, that "'provision shall be made for such proceedings being reviewed "'by not less than three persons who hold or have held high "'judicial office, in all cases in which sentence of death is "'passed.'" Finally it declared that :—"2. This Act may "be cited as the Emergency Powers (Defence) (No. 2) Act, "1940, and shall be included among the Acts which may be "cited together as the Emergency Powers (Defence) Acts, "1939 and 1940."

Before the Chief Justice a preliminary objection was made on behalf of the appellant, who had pleaded "not guilty," that reg. 23 was invalid by reason of its non-compliance with s. 1, sub-s. 2 (*aa*), of the Emergency Powers (Defence) Act, 1939, as amended by s. 1, sub-s. 2, of the Emergency Powers (Defence) (No. 2) Act, 1940. The Chief Justice upheld the objection and after an application to amend the indictment granted an adjournment. On August 25, 1943, the Chief Justice, after hearing further arguments, reversed his decision on the preliminary point, and held that the special court was established by the Trial of Special Offences Ordinance and not by virtue of the powers conferred by the Emergency Powers (Defence) Acts, 1939 and 1940; and that that Ordinance was valid. The appellant, as stated, was convicted and sentenced to death.

1943. Dec. 13. *Borenius* for the appellant. Regulation 23 of the Gibraltar Defence Regulations, 1939, having been made pursuant to the powers conferred by the Emergency Powers (Defence) Act, 1939, as extended to Gibraltar by order in council, and power having been given by the Emergency Powers (Defence) (No. 2) Act, 1940, to create special courts, subject to provision for review, the special court which tried the appellant, to be validly constituted, should have been created under the Acts of 1939 and 1940 and the conviction and sentence of the appellant subject to review as provided therein. The overriding effect of the Emergency Powers (Defence) Acts, 1939 and 1940, is to make it impossible for the Governor of Gibraltar to make provision for a special court by Ordinance. The Trial of Special Offences Ordinance, 1943, is invalid in that it neither complies with the requirements of s. 1, sub-s. 2 (*aa*), of the Emergency Powers (Defence) Act, 1939, nor is valid under the powers exercisable by the Governor of Gibraltar under the provisions of the Letters Patent of September 12, 1922. The special court was not lawfully constituted and was without jurisdiction to try the appellant. [The point that the Chief Justice could not lawfully reverse his own decision on the preliminary objection was abandoned.]

Sir Donald Somervell A.-G., *Sir David Maxwell Fyfe S.-G.*, and *Preedy* for the Crown were not called upon.

1943. Dec. 13. VISCOUNT SIMON L.C. said that their Lordships would humbly advise His Majesty that the appeal should be dismissed.

1944. Feb. 11. VISCOUNT SIMON L.C. delivering their Lordships' reasons for dismissing the appeal, referred to the relevant statutory provisions and continued : It was submitted to their Lordships that as the conviction and death sentence pronounced by the Chief Justice were not subject to review as described above the special court presided over by the Chief Justice which tried and convicted the appellant was without jurisdiction and its proceedings invalid. The argument, as their Lordships understood, was that, the offence being constituted by regulations made under the Act of 1939, the court to try such offences must be appointed under the additional powers inserted in that Act by the provisions of the Act of 1940. The combined provisions of the two Acts, it was said, alone gave power to create special courts to deal with such offences. The conclusive answer to this contention, in their Lordships' view, is that the special court which tried the appellant was created by the Trial of Special Offences Ordinance, 1943, and not under the Emergency Powers Acts or regulations made thereunder. Nor need it be created under

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these Acts or regulations. The regulation defines the offence, but it does not establish the court, and the court exists and exercises its jurisdiction quite apart from the regulations. It is true that the later Act empowers the appointment of special courts to try offences created by defence regulations, but it does not confine the trial of these offences to such courts, nor compel their creation for that purpose. The power is permissive and not obligatory, and the validity of the regulations and of the trial is not dependent on the appointment of the special courts whose creation is permitted by the Act of 1940. The offence can be tried by any court exercising jurisdiction either as a result of the powers conferred by that Act or under any other lawful authority. In their Lordships' opinion, the objection to the jurisdiction of the court cannot be sustained, and in these circumstances the conviction and sentence must stand.

Counsel for the appellant rightly abandoned the remaining point taken in the appellant's case, namely, that the Chief Justice, having in the first instance declared himself satisfied that the objection taken was a good one, could not, after further argument and reflection, rule that it failed. No consequences followed from the expression of the Chief Justice's original view; except an adjournment. There was no acquittal or discharge, and the argument is untenable.

For purposes of record, their Lordships think it well to add that after conviction and sentence, the Chief Justice entertained an application for leave to appeal to His Majesty in Council, and purported to grant leave, under the impression that the order in council regulating appeals to His Majesty in Council from Gibraltar (St. R. & O., 1909, p. 794), applies to a criminal case. It does not; the order in council is in the same terms as that considered by the Judicial Committee in *Chung Chuck* v. *The King* (1), when it was held that the language of the order did not authorize such leave to appeal in a criminal matter. If such leave is given, it must be by His Majesty in Council. To avoid the frustration of the proceedings from this cause, their Lordships advised His Majesty that special leave to appeal should be given, and this was so given by order in council of December 10, 1943.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondent: *Burchells.*

(1) [1930] A. C. 244.

Distinguished. BAKER *v.* TURNER.
[1950] 1 All E.R. 834.

Distinguished. BAKER *v.* TURNER
[1950] A. C. 401

H. L. (E.)*

1944

Mar. 7, 8.

SUN LIFE ASSURANCE COMPANY OF CANADA . . . . APPELLANTS;

AND

JERVIS . . . . RESPONDENT.

Appeal—House of Lords—Competence—Leave to appeal—Terms—Appellants' undertaking to pay costs in House of Lords in any event and not to ask for return of sum paid by order of Court of Appeal—Administration of Justice (Appeals) Act, 1934 (24 & 25 *Geo.* 5, *c.* 40), *s.* 1.

It is an essential quality of an appeal fit to be disposed of by the House of Lords that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

Leave to appeal to the House of Lords given by the Court of Appeal was made subject to an undertaking by the appellants " to pay the costs as between solicitor and client in the House of " Lords in any event and not to ask for the return of any money " ordered to be paid by this order " :—

Held, that since there was no issue to be decided between the parties, the House should decline to hear the appeal.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON L.C., were as follows; An action was brought by the respondent to settle his rights under an endowment policy of life assurance issued to him by the appellants in December, 1929. Before he effected the insurance the respondent received from the appellants a document which purported to describe the benefits which he would receive, but which, he contended, held out as results to flow from the insurance benefits greater than the policy itself provided. The respondent's action was for rectification of the policy to make its terms equivalent to the document mentioned, and the Court of Appeal (Scott and Goddard L.JJ., Luxmoore L.J. dissenting), affirming the decision of Atkinson J., upheld the respondent's contention and decided that the policy should be rectified and that an additional sum was due to him. The appellants applied to the Court of Appeal for leave to appeal to the House of Lords and the Court of Appeal granted leave on terms which were included in the order of the court and which were as follows: " On the defendants " undertaking to pay the costs as between solicitor and client

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**Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL of KILLOWEN and LORD PORTER.

"in the House of Lords in any event and not to ask for the "return of any money ordered to be paid by this order."

VISCOUNT SIMON L.C. intimated that since, under the terms of the leave to appeal given to the appellants, they had no monetary interest in the result of the appeal, the House wished to hear argument on the question whether the appeal was competent.

Pritt K.C., *Slade K.C.* and *Anthony Gordon* for the appellants. The House ought to determine this appeal. It is true that the courts will not entertain a purely hypothetical case or a feigned issue and that they will not answer a question which is merely academic, but in this case the litigation was fought out at arm's length. There was no negotiation between the parties, but the appellants were anxious to give the respondent the most generous possible terms in relation to this appeal. It is not the law that the courts will not entertain litigation unless the parties may derive a financial advantage from it. Money is not the only thing in the world, and it would make a difference to the respondent to know that he had established a legal right to the remedy he claims. There is, however, a real issue to be decided whether or not he is owed the money in question on the basis of certain documents. The matter depends wholly on those documents and the decision would govern a large number of cases. There is no record, in workmen's compensation cases or elsewhere, of leave to appeal being granted on conditions which so fully protected the respondent, but it has never been held that such conditions could not be imposed or that the House should not hear an appeal in circumstances such as these. The courts will not entertain a purely hypothetical case: *Glasgow Navigation Co.* v. *Iron Ore Co.* (1) and *Tindall* v. *Wright* (2), but they will entertain a "friendly action": *Powell* v. *Kempton Park Racecourse Co., Ld.* (3), *Thorne* v. *Motor Trade Association* (4). In any event, however, on the strict terms of the order of the Court of Appeal, the respondent is interested in the result of these proceedings. It states that the respondents undertake "not to ask for the return of any "money ordered to be paid by this order." If, as is the case, the money had not been paid under that order and the House of Lords allowed the appeal, the respondent would not thereafter be entitled in law to recover it since he had failed to do so under the order of the Court of Appeal while it was subsisting. That is the position in law, although, of course, the appellants would not take advantage of it. Finally, if it be held, contrary to the appellants' contention, that the terms of the conditions constitute an absolute bar to the appeal and do not leave the matter in the discretion of the House, the Court of Appeal should be given an opportunity to revise the order and repair the mistake. If the court, in giving leave to appeal, imposes such terms as destroy the right of appeal, the order is a nullity. Alternatively, if the House considers that the mistake cannot be remedied, the appellants ask leave to withdraw the appeal.

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(1) [1910] A. C. 293.

(2) (1922) 127 L. T. 149.

(3) [1899] A. C. 143, 152, 157, 189.

(4) [1937] A. C. 797, 800, 813.

C. Henderson K.C. and *Winning* for the respondent, having stated that the respondent had no financial interest in the result of the appeal, were not called on to argue.

VISCOUNT SIMON L.C. My Lords, in my opinion, the House should decline to hear this appeal on the ground that there is no issue before us to be decided between the parties. The difficulty is that the terms put on the appellants by the Court of Appeal are such as to make it a matter of complete indifference to the respondent whether the appellants win or lose. The respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties. What is sometimes called a " friendly action " is not necessarily open to this objection, either in the first court or on appeal, for the respective parties in such an action are arguing for different results and the winner gains something which he would not gain if he lost, but the objection here is that, if the appeal fails, the respondent gains nothing at all from his success.

No doubt, the appellants are concerned to obtain, if they can, a favourable decision from this House because they fear that other cases may arise under similar documents in which others who have taken out policies of endowment assurance with them will rely on the decision of the Court of Appeal, but if the appellants desire to have the view of the House of Lords on the issue on which the Court of Appeal has pronounced, their proper and more convenient course is to await a further claim and to bring that claim, if necessary, up to the House of Lords with a party on the record whose interest it is to resist the appeal. The research which has been given to the matter does not discover any previous decision in which the House of Lords has undertaken, on the petition of an unsuccessful appellant, to review the decision below when the opposite party has been finally settled with, and I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

This decision is by no means designed to discourage, in suitable cases, the putting of an unsuccessful litigant " on terms " as a condition of his being given leave to appeal from the Court of Appeal to this House. Terms requiring that, in view of the position of the successful party, the appellant should undertake to ask for no costs in this House, or even should undertake to meet the costs of both sides in any event, may be perfectly proper. Again, cases may sometimes arise where the term is imposed that the respondent shall keep, at any rate, a portion of his damages whatever the result of the appeal, but what is objectionable is that the terms for leave to appeal should be so framed as to take away from the respondent any interest in the result of the appeal whatever.

To avoid possible misunderstanding I had better add that a stricter rule has been applied in the case of appeals to the Court of Appeal. In that case the appeal is (generally speaking) as of right, and when that is the case the Court of Appeal has laid it down that it is improper for the judge of first instance to compel persons to pay moneys in any event, which moneys it may subsequently be held by a higher court that they were under no legal duty to pay at all: see *Bloor* v. *Liverpool*

Derricking and Carrying Co., Ld. (1), per Slesser L.J., following *Doyle* v. *White City Stadium Ld.* (2). However that may be, those were cases where the defeated party was entitled to appeal as of right, whereas appeals to this House are by leave, and, therefore, conditions may within limits be put on the defeated party who seeks to appeal to the House of Lords. The Administration of Justice (Appeals) Act, 1934, which provides that there shall be no appeal to this House unless leave is given either by the Court of Appeal or by the House itself, does not in terms assert that, whatever conditions are imposed by the Court of Appeal when giving leave, the House of Lords must hear the case, and there is nothing contrary to the statute in holding that the House should not hear argument on this appeal, having regard to the conditions imposed by the Court of Appeal which have deprived the matter before us of the quality of a live issue in this litigation. It is not necessary to lay down a rule for all cases. It is enough to say that, in my opinion, if the appellants had not applied to withdraw this appeal, this appeal should be dismissed. As it is, I move that the appellants' application be granted, and leave to be given for this appeal to be withdrawn. The appellants will, of course, pay the costs in this House as between solicitor and client in accordance with their undertaking.

LORD ATKIN. My Lords, I agree.

LORD THANKERTON. My Lords, I also agree.

LORD RUSSELL OF KILLOWEN. My Lords, I also agree.

LORD PORTER. My Lords, I do also.

Leave given for appeal to be withdrawn.

Solicitors for appellants: *Freshfields, Leese & Munns.*

Solicitors for respondent: *Maude & Tunnicliffe for James Young, Grimsby.*

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(1) (1936) 56 Ll. L. Rep. 39, 43. (2) [1935] 1 K. B. 110.

H. L. (E.)* KNUPFFER . . . . APPELLANT;

1944

AND

Jan. 31; Feb. 1, 2; April 3.

LONDON EXPRESS NEWSPAPER, LIMITED . . . . RESPONDENTS.

Defamation—Libel—Libel on a class—Action by individual member—Competence.

It is an essential element of the cause of action for defamation that the words complained of should be published "of the "plaintiff." Where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him. If a defamatory statement made of a class or group can reasonably be understood to refer to every member of it, each one has a cause of action.

Decision of the Court of Appeal [1943] K. B. 80 affirmed.

APPEAL from the Court of Appeal (1).

The respondents printed and published in their newspaper on July 1, 1941, the words following: "The quislings on whom "Hitler flatters himself he can build a pro-German movement "within the Soviet Union are an emigré group called Mlado "Russ or Young Russia. They are a minute body professing "a pure Fascist ideology who have long sought a suitable "fuehrer—I know with what success. Established in France "and the United States they claim to have secret agents able "to enter or leave the Soviet Union at will. Hitler intends to "nominate a puppet fuehrer from their ranks to replace the "Soviet national leaders of the Kremlin, and establish a "reactionary totalitarian serf State on the German and Italian "model. The proposed line of operation is the seducing of "Red Army officers from their allegiance to their country "and with their aid destroying trade unions, co-operatives, "collective farms, and the Soviet parliamentary system with a "ruthless massacre of all the present leaders, great and small, "of the Russian people. The vast majority of Russian emigrés "repudiate these people, but Hitler is accustomed to find "instruments among the despised dregs of every community. "He intends Ukrainian pogroms as a starting point for general

Present :—VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN and LORD PORTER.

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(1) [1943] K. B. 80.

"anarchy in Russia." The appellant, a Russian resident in London, brought an action against the respondents for damages for libel, setting out the above words in the statement of claim, and alleging that they had been falsely and maliciously printed and published of him by the respondents. The respondents, who did not plead justification, denied that they printed or published the words of the appellant or that they were reasonably capable of being understood to refer to him. Evidence was given at the trial that the appellant had joined the Young Russia Party in 1928, that in 1935 he became assistant representative of the party in Great Britain, and that in 1938 he was appointed representative of the party in Great Britain and head of the British branch. The headquarters of the party were in Paris until June, 1940, when they were removed to America. The total membership was about 2,000 and the British branch comprised twenty-four members. Four witnesses who were acquainted with the appellant were called on his behalf and were asked questions to the following effect: "To "whom did your mind go when you read that article?" Each intimated that it was to the appellant. Stable J. held that the words of the libel referred to the appellant and entered judgment for him for 3,500*l.* damages. The Court of Appeal (MacKinnon and Goddard L.JJ.) held that the words could not be regarded as referring to him and allowed the appeal. The appellant appealed to the House of Lords.

Angus Macmillan for the appellant. When a defamatory statement is made of an unincorporated association or group or class of persons no representative or collective action can be open to them as a whole. It follows that the only remedy afforded by the law can be individual action at the suit of those members of the class capable of being defamed by the statement. Given certain conditions of practical feasibility it may be that all members of the class can sue individually: *Foxcroft* v. *Lacey* (1); *Henacre and Bets' Case* (2); *Society of Solicitors* v. *Robertson* (3); *Reg.* v. *Gathercole* (4); *Macphail* v. *Macleod* (5); *Browne* v. *D. C. Thomson & Co.* (6) and *Gross* v. *Cantor* (7). Though the defamed class be too large and too indeterminate to admit of action being open to each and every

(1) (1613) Hob. 89.
(2) (1675) Keble. 525.
(3) (1781) Mor. 13935.
(4) (1838) 2 Lewin 237.
(5) (1895) 3 S. L. T. 91.
(6) 1912 S. C. 359.
(7) (1936) 270 N. Y. 93.

member individually, yet any member of whom the defamatory statement is reasonably capable of being understood as defamatory may have a right of action. To determine whether this is or is not the case the ordinary rules relating to libel by innuendo apply : see *Jones* v. *E. Hulton & Co., Ld.* (1). In such a case as the present, since there can be no representative or collective action, there would be a denial of a remedy, if individual action were barred. There is no absolute rule and each case must depend on its own facts. In the present case the position of the appellant in the defamed class rendered the words capable of referring to him and witnesses said that they understood them as referring to him. While the words did not necessarily reflect on all the members, they did reflect on the appellant as a particularly prominent member. He is the head of the party in England, the sole link of the British branch with the outside world and with the rest of the party. The circumstance of the publication of the libel in England made it particularly applicable to the appellant, for, at the time, the organization in France had ceased to exist so that, so far as Europe was concerned, England was the only centre left. The article refers to " a minute body," words particularly applicable to England where the membership was minute. The libel particularly attacks those who are responsible for the policy of the party, and, accordingly, directly hits at persons who are representatives in the branches. [He referred to *Le Fanu* v. *Malcolmson* (2) ; *Eastwood* v. *Holmes* (3) ; *O'Brien* v. *Eason & Son* (4) ; *Wardlaw* v. *Drysdale* (5) ; *Campbell* v. *John Ritchie & Co.* (6) ; *Campbell* v. *Wilson* (7) ; *Ortenburg* v. *Plamondon* (8) ; *David Syme & Co.* v. *Canavan* (9).]

Serjeant Sullivan K.C. and *Slade K.C.* for the respondents were not called on to argue.

THE HOUSE took time for consideration.

April 3. VISCOUNT SIMON L.C. My Lords, it is an essential element of the cause of action for defamation that the words complained of should be published " of the plaintiff." If the words are not so published, the plaintiff is not defamed and cannot have any right to ask that the defendant should be held responsible to him in respect of them.

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(1) [1909] 2 K. B. 444, 477.
(2) (1848) 1 H. L. C. 637, 664.
(3) (1858) 1 F. & F. 347.
(4) (1913) 47 Ir. L. T. 266.
(5) (1898) 25 R. 879.
(6) 1907 S. C. 1097, 1101.
(7) (1934) S. L. T. 249.
(8) (1914) 24 Quebec K. B. 69.
(9) (1918) 25 Commonwealth L. R. 234, 238.

In the words complained of in this case there is no specific mention of the appellant from beginning to end, and the only countries in which it is stated that this group of emigrés is established are France and the United States. Evidence was given at the trial that the appellant had joined the Young Russia Party in 1928, that in 1935 he became assistant representative of the Young Russia movement in Great Britain, and that in 1938 he was appointed representative of the movement in Great Britain and head of the British branch of the movement. The headquarters of the movement were in Paris until June, 1940, when they were removed to America.

These facts, standing alone, however, do not justify the conclusion that the words complained of are capable of being read as a defamation of the appellant. The words make allegations of a defamatory character about a body of persons —some thousands in number—who belong to a society whose members are to be found in many countries. In *O'Brien* v. *Eason & Son* (1), Holmes and Cherry L.JJ. ruled that where comments of an alleged defamatory character were made on an association called the Ancient Order of Hibernians, an individual member of the order, who was not named nor in any way referred to, could not maintain an action of libel. They referred (2) to a well-known dictum of Willes J., uttered more than fifty years before, in *Eastwood* v. *Holmes* (3), that "if a man wrote that all lawyers were thieves, no particular "lawyer could sue him unless there is something to point to the "particular individual." Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to. There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action. A good example is *Browne* v. *D. C. Thomson & Co.* (4), where a newspaper article stated in Queenstown "instructions were issued by the Roman "Catholic religious authorities that all Protestant shop "assistants were to be discharged," and where seven pursuers who averred that they were the sole persons who exercised religious authority in the name and on behalf of the Roman Catholic Church in Queenstown were held entitled to sue for libel as being individually defamed. Lord President Dunedin in that case said (1): " I think it is quite evident that if a " certain set of people are accused of having done something, " and if such accusation is libellous, it is possible for the " individuals in that set of people to show that they have been " damnified, and it is right that they should have an oppor- " tunity of recovering damages as individuals." In the present case, however, the appellant rejected the view that every member of the Young Russia Group could bring his own action on the words complained of, and relied on his own prominence or representative character in the movement as establishing that the words referred to himself. There is, however, nothing in the words which refers to one member of the group rather than another. *Le Fanu* v. *Malcolmson* (2) was, it is true, a decision of this House in which Lord Cottenham L.C. and Lord Campbell held that the verdict of a jury awarding damages to the owners of a factory in the county of Waterford against the proprietor of a newspaper published in that county could be upheld notwithstanding that the letterpress, in the course of denouncing the alleged cruelty with which factory operatives were treated, did not specifically refer to the plaintiff's factory. It appears, however, in that case that there were circumstances, such as the location of the factory, which enabled the jurors to identify the plaintiff's factory as the factory pointed at, and the Lord Chancellor observed (3) that " if a party can publish a libel so framed as to " describe individuals, though not naming them, and not " specifically describing them by any express form of words, " but still so describing them that it is known who they are, " as the jurors have found it to be here, and if those who must be " acquainted with the circumstances connected with the party " described may also come to the same conclusion, and may " have no doubt that the writer of the libel intended to mean " those individuals, it would be opening a very wide door to " defamation, if parties suffering all the inconvenience of being " libelled were not permitted to have that protection which " the law affords." It will be observed that *Le Fanu* v. *Malcolmson* (2) was a case where there were facts pointing to

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(1) 47 Ir. L. T. 266.
(2) Ibid. 266, 267, 268.
(3) 1 F. & F. 347, 349.
(4) 1912 S. C. 359.

(1) (1912) S. C. 363.
(2) 1 H. L. C. 637.
(3) Ibid. 664.

the particular factory which was meant to be referred to though the article spoke in more general terms of a factory in Waterford. In the present case the statement complained of is not made concerning a particular individual, whether named or unnamed, but concerning a group of people spread over several countries and including considerable numbers. No facts were proved in evidence which could identify the appellant as the person individually referred to. Witnesses called for the appellant were asked the carefully framed question: "To "whom did your mind go when you read that article?" and they not unnaturally replied by pointing to the appellant himself, but that is because they happened to know the appellant as the leading member of the society in this country and not because there is anything in the article itself which ought to suggest even to his friends that he is referred to as an individual.

There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law—can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact—Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative. I move that this appeal be dismissed.

Lord Atkin (read by Lord Thankerton). My Lords, I have read the opinion about to be delivered by my noble and learned friend Lord Porter, and agree with it and with the proposed motion that the appeal be dismissed. I add a few words, however, for I wish to emphasize the point that the judgments in the Court of Appeal appear to over-elaborate the law of libel as applicable to this case. I venture to think that it is a mistake to lay down a rule as to libel on a class, and then qualify it with exceptions. The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. It is irrelevant that the words are published of two or more persons if they are proved to be published of him, and it is irrelevant that the two or more persons are called by some generic or class name. There can be no law that a defamatory statement made of a firm, or trustees, or the tenants of a particular building is not actionable, if the words would reasonably be understood as published of each member of the firm or each trustee or each tenant. The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or, at any rate, of himself. Too much attention has been paid, I venture to think, in the textbooks and elsewhere to the ruling of Willes J. in 1858 in *Eastwood* v. *Holmes* (1), a case at nisi prius in which the judge non-suited the plaintiff both because he thought there was no evidence that the words were published of the plaintiff and for other reasons, and, so far as the first ground is concerned, it appears to me on the facts to be of doubtful correctness. His words (2): " it only reflects on a class of persons " are irrelevant unless they mean " it does not reflect on the " plaintiff," and his instance (2) " All lawyers were thieves " is an excellent instance of the vulgar generalizations to which I have referred. It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class. I agree that in the present case the words complained of are, apparently, an unfounded generalization conveying imputations of disgraceful conduct, but not such as could reasonably be understood to be spoken of the appellant. It becomes unnecessary to deal with the question of excessive damages. I content myself by saying that, if the libel had been published of the appellant, while the damages awarded are possibly too high, I do not find myself in any degree in accord with the estimate of the damages suggested by the Court of Appeal.

LORD THANKERTON. My Lords, I concur in the opinions which have just been delivered.

(1) 1 F. & F. 347. (2) Ibid. 349.

LORD RUSSELL of KILLOWEN (read by LORD THANKERTON). My Lords, I agree that this appeal fails. The crucial question in these cases in which an individual plaintiff sues in respect of defamation of a class or group of individuals is whether on their true construction the defamatory words were published of and concerning the individual plaintiff. Unless this can be answered in the affirmative he has no cause of action. It is not, I think, the case of a defined primary rule with defined exceptions to the rule. I would rather say that in every case it is the question indicated above. When the construction of the matter complained of comes under consideration, there may be something in the defamatory matter or in the circumstances in which it is published, which indicates, and enables a jury to find, that particular individuals are defamed, although they are not named. *Le Fanu* v. *Malcolmson* (1) is an instance of this. Or the class or group can be identified, and is such that each member thereof is necessarily defamed. *Browne* v. *D. C. Thomson & Co.* (2) is an instance of this. A body of trustees or directors would furnish another instance in which defamation of the body involves defamation of each member thereof. The present case, however, is far removed from these considerations. The newspaper article makes allegations about a body of persons some thousands in number, established in France and the United States of America. It makes no reference of any kind to the appellant or even to England. There is nothing in it which would enable anyone to identify any person as being a member of the body. All that can be said is that a person who read it and who knew that the appellant was a member of the body would know that he was one of the numerous individuals from whose ranks Hitler hoped at some time to nominate a puppet fuehrer in Russia. Nothing more than that. That is really all that I can attribute as the meaning of the answers given by the appellant's friends to the carefully worded and stereotyped question of the appellant's counsel, viz., "To "whom did your mind go when you read that article?" In my opinion, it is impossible to construe the article in any way which would justify the view that it contained defamatory matter published of and concerning the appellant.

LORD PORTER (read by LORD MACMILLAN). My Lords, this case raises once again the question which is commonly expressed in the form: "Can an individual sue in respect of words "which are defamatory of a body or class of persons "generally?" The answer as a rule must be "No," but the inquiry is really a wider one and is governed by no rule of thumb. The true question always is: "Was the individual, "or were the individuals, bringing the action personally pointed "to by the words complained of?"

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(1) 1 H. L. C. 637. (2) 1912 S. C. 359.

Many of the earlier cases appear to have been concerned with words alleged to refer, not to a class, but to one or more out of a larger number of persons without, it was said, sufficiently indicating who was aimed at. The authorities quoted in argument in *Le Fanu* v. *Malcolmson* (1) were of this type though in that case itself the defamatory words complained of, while they appeared to apply to a class, in reality were capable of being shown, and were shown, to be applicable to some of the individuals comprising that class. No doubt, it is true to say that a class cannot be defamed as a class, nor can an individual be defamed by a general reference to the class to which he belongs. Willes J.'s well known words in *Eastwood* v. *Holmes* (2) sufficiently illustrate the point. Nevertheless, the words or the words combined with the relevant circumstances may be shown to refer to some person or persons individually. *Le Fanu* v. *Malcolmson* (1) has already been quoted, and *Foxcroft* v. *Lacy* (3) is an earlier example to the same effect. In each case a number of persons were involved, but they sued, jointly or severally, as individuals because their identity was sufficiently ascertained.

The question whether the words refer in fact to the plaintiff or plaintiffs is a matter for the jury or for a judge sitting as a judge of fact, but as a prior question it has always to be ascertained whether there is any evidence on which a conclusion that they do so refer could reasonably be reached. In deciding this question the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration, but none of them is conclusive. Each case must be considered according to its own circumstances. I can imagine it being said that each member of a body, however large, was defamed where the libel consisted in the assertion that no one of the members of a community was elected as a member unless he had committed a murder.

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(1) H. L. C. 637

(2) 1 F. & F. 347, 349.

(3) Hob. 89.

Whatever the tribunal, the first question is: Are the words in conjunction with the relevant circumstances reasonably capable of being understood to apply to the plaintiff? In the present case that question must, I think, be answered in the negative. It is true that the appellant was and is a member of a body on which very grave reflections have been cast, that he is the representative of that body in England, and that there are only twenty-four members of it in this country, but the newspaper article makes no reference to England. It confines itself to allegations about "a minute body" "established in "France and the United States." Minute, no doubt, its membership of 2,000 is when compared with the vast population of Russia, but in itself it forms a considerable body. Out of that body there was nothing to point to the appellant, nor indeed to any individual in this country. Nor do I think the appellant's case is improved by the allegations of his friends that "their minds turned to" him when they read the article. Apart from the vagueness of the question, I can see no justification for an inference that he was the person aimed at. If it could be said, as it is conceded it could not, that each member of the body, wherever resident, could claim to be defamed, some case might be made on behalf of the appellant as one of its members, but as the evidence stands I see nothing to point to him in contra-distinction to the rest. Indeed, inasmuch as he is a member of the English group, he is the less likely to be referred to. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Hasties.*
Solicitors for respondents: *Shirley Woolmer & Co.*

J. C.*

1944

May 3.

MONTREAL COKE AND MANUFACTURING COMPANY . . . . . APPELLANTS;

AND

MINISTER OF NATIONAL REVENUE . RESPONDENT.

MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED . . . . . APPELLANTS;

AND

SAME . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Revenue—Income tax—Deductions—Company—Redemption of bond issue—New bonds issued at lower interest rates—Less onerous conditions of payment—Expenditure incurred in effecting conversion—Income War Tax Act, R. S. C., 1927, c. 97, s. 6 (a) (b).

By s. 6 of the Income War Tax Act, 1927 : " In computing the " amount of the profits or gains to be assessed, a deduction shall " not be allowed in respect of (*a*) disbursements or expenses not " wholly, exclusively and necessarily laid out or expended for the " purpose of earning the income ; (*b*) . . . . any payment on " account of capital . . . ."

The appellant companies, which had issued bonds, redeemable before maturity at a premium, and payable both as to principal and interest at the bondholder's option in currency other than Canadian dollars, with a view to reducing their annual interest charges redeemed the bonds before maturity and reborrowed at lower rates of interest and on less onerous conditions as to payment. The expenses incurred in effecting those financial changes included the payment of premium on redemption, disbursements on account of exchange, discount to underwriters overlapping of interest payments, and legal, printing and other incidental expenses. On a claim by the appellants that that expenditure had been incurred wholly, exclusively and necessarily for the purpose of earning income—by increasing their profits by reducing the annual interest payments—and was, accordingly, deductible for the purposes of assessment to income tax :—

Held, that expenditure, to be deductible, must be directly related to the earning of income from the trade or business conducted ; that the businesses of the appellants were not to engage in financial operations and expenditure incurred in relation to the financing of their businesses was not laid out for the purpose of earning income in their businesses within the statutory meaning ;

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* *Present* :—VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD PORTER.

and, accordingly, that under s. 6 (*a*) of the Income War Tax Act, 1927, that expenditure was not an allowable deduction.

View of the courts below that the deductions claimed also fell to be disallowed as being payments " on account of capital " within s. 6 (*b*) of the Act, not dissented from.

Judgments of the Supreme Court of Canada [1942] S. C. R. (Can.) 89, affirmed.

CONSOLIDATED APPEALS (No. 51 of 1942), by special leave, from judgments of the Supreme Court of Canada (February 3, 1942), which had affirmed judgments of the Exchequer Court of Canada (January 11 and 14, 1941).

The following facts are taken from the judgment of the Judicial Committee: The appellants in these consolidated appeals, hereinafter for brevity called " The Coke Company " and " The Light Company," carried on important undertakings in Canada which were financed in part by money borrowed from the public on interest-bearing bonds. At January 1, 1935, the Coke Company had outstanding a series of 5½ per cent. bonds maturing in 1947, but redeemable prior to maturity at a premium. Principal and interest were payable at the bondholder's option in United States dollars. The Light Company at January 1, 1936, had outstanding a series of 5 per cent. bonds maturing in 1951. Principal and interest were payable at the bondholder's option in gold at Montreal, Toronto, New York, or London. Owing to the state of the exchange the options as to the mode of payment occasioned considerable expense to both companies. Market conditions being favourable, both companies decided, with a view to reducing their interest charges, to redeem their existing bonds before maturity and to reborrow at lower rates on less onerous conditions as to payment. The carrying through of those financial operations necessarily involved substantial outlays on the part of both companies. The question for decision in this appeal was whether those outlays were permissible deductions under the Income War Tax Act, 1927, in the assessment of the appellants' taxable income.

In the case of the Coke Company the amount of the 5½ per cent. bonds outstanding was $3,457,000. Notice was given that the bonds would be redeemed at December 1, 1935, the next date for the payment of interest. As that date anticipated the maturity of the bonds, a premium of two per cent. was payable, amounting to $69,140. The bondholders being entitled at their option to payment in United States dollars, that involved the disbursement of $36,744.81 on account of exchange premium. Under the scheme the company paid off $57,000 of the bonds out of earnings and replaced the balance of $3,400,000 by the issue of two new series of bonds, one of $1,200,000 3½ per cent. bonds, the other of $2,200,000 4 per cent. bonds, principal and interest being payable in Canada. A commission or discount of ½ per cent. on the 3½ per cent. issue and of 1 per cent. on the 4 per cent. issue was paid to underwriters who took up the whole of both issues. That commission or discount amounted to $28,000. Those three sums of $69,140, $36,744.81 and $28,000, amounting together to $133,884.81, the company decided to amortize by spreading them over twelve years, involving a charge of $10,535.16 annually against income. As the old bonds were not repaid till December 1, 1935, and the new bonds dated from September 16, 1935, the company had to pay interest on both the old bonds and the new bonds for the overlapping period. That cost the company $23,207.54. Legal, printing and other incidental expenses were incurred to the amount of $12,484.92 in connexion with the retiring of the old bonds and the issue of the new bonds. Those two items the company charged wholly against the income of the year 1935, but was willing to amortize them on the same footing as the other items above mentioned. The result of that "refinancing" was a reduction of the company's interest charges by $4,750 in 1935, and $55,716.66 in 1936. In contrast with the system obtaining in the United Kingdom the legislation of Canada permitted in the computation of taxable income, the deduction of "such "reasonable rate of interest on borrowed capital used in the "business to earn the income as the Minister in his discretion "may allow"; Income War Tax Act, 1927, s. 5 (*b*). Consequently, a diminution in deducted interest charges reflected itself, other things being equal, in increased taxable income.

The details in the case of the Light Company were on the same lines. The company had outstanding 5 per cent. bonds to the amount of $27,615.000. The premium paid on their retirement was 4 per cent., amounting to $1,104,600. The exchange premium cost $676,726. The old bonds were repaid out of the proceeds of the sale of investments to the extent of $12,615,000. The balance of $15,000,000 was reborrowed on two series of bonds with different periods of redemption, one of $5,000,000 at 2½ per cent., and one of $10,000,000 at 3½ per cent., principal and interest being payable in Canada. Discount at the rate of 1½ per cent. was paid on the 2½ per cent. issue and at the rate of 4 per cent. on the 3½ per cent. issue, amounting in all to $475,000. Expenses in connexion with the operation accounted for $25,753.42. Those four items, totalling $2,282,079.42, the company amortized by spreading them over twenty years, the amount debited to 1936 (for eleven months) being $104,596.04. In that case also there was overlapping interest to the amount of $79,166.64, and the whole of that, as well as an item of $29,134.75, representing excise tax and expenses paid on the transfer of certain securities, the company charged against 1936 without amortization. The result of the whole operation was a large saving in interest charges and exchange.

The Coke Company, in making its return of income for the year 1935, deducted a sum of $46,227.62 made up of the amortization instalment of $10,535.16, the overlapping interest $23,207.54, and expenses $12,484.92, as already detailed. In its return for 1936 the company deducted the amortization instalment of $10,535.16. The Light Company in making its return for the year 1936 deducted a sum of $212,897.43, made up of the amortization instalment of $104,596.04, the overlapping interest $79,166.64, and the excise tax $29,134.75.

The respondent, the Minister of National Defence, disallowed in toto the deductions claimed by the Coke Company. The company served a notice of appeal on the minister. The minister affirmed his assessment. Thereupon the company sent to the minister a notice of dissatisfaction, to which the minister replied adhering to his decision. Finally, the minister caused the relevant documents to be transmitted to the registrar of the Exchequer Court of Canada, and the matter was then deemed to be an action in that court ready for trial or hearing. The procedure in the case of the Light Company followed the same lines. The claim to deduct the item of $29,134.75 for excise tax was not pursued and disappeared from the case.

The appeals of both parties were heard in the first instance by McLean J., who affirmed the minister's decision disallowing the deductions. Appeals to the Supreme Court were dismissed by a majority (Duff C.J., Davis and Kerwin JJ.; Rinfret and Taschereau JJ. dissenting). The reasoned judgments of the court were given in the Light Company's appeal (1).

The question at issue turned on the terms of the Income

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(1) [1942] S. C. R. (Can.) 89.

War Tax Act, 1927, part II. of which was headed : "Exemptions and deductions," and contained s. 6, which had a sub-heading "Deductions from income not allowed." So far as relevant to the present purpose that section provided : "In "computing the amount of the profits or gains to be assessed, "a deduction shall not be allowed in respect of (*a*) disbursements or expenses not wholly, exclusively and necessarily "laid out or expended for the purpose of earning the income ; "(*b*) any outlay, loss or replacement of capital or any payment "on account of capital or any depreciation, depletion or "obsolescence, except as otherwise provided in this Act." By s. 9 of the Act the tax was charged on income, and by s. 3 income was defined to mean annual net profit or gain.

1944. March 27, 28, 29. *Tucker K.C.* and *Gahan* for the appellants. The appeals raise an important question of principle. The object of the appellants in effecting the conversion was to increase their future earnings by reducing their annual interest charges. The matter must be decided under the general principles applicable in arriving at the profits of a business and not under any particular enactment. There is in substance no difference between the Imperial and the Canadian Act with respect to the words "expense wholly "and exclusively laid out or expended for the purpose of the "appellants' trade": *Strong & Co., Ld.* v. *Woodifield* (1). It was said in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2) that "the balance of the profits or gains of a trade is struck by "setting against the receipts all expenditure incidental to the "trade which is necessary to earn them, and by applying, in "the computation, the ordinary principles of commercial "trading." The expenditure in question is either a capital or a revenue expenditure. The former always involves the turning of one asset into another of the same value in some manner. [Reference was made to the judgment of Rowlatt J. in *Anglo-Persian Oil Co.* v. *Dale* (3)]. If there is a liability, and if, by spending a sum of money, that liability is reduced, that sum is spent in earning the profits provided that an asset is not acquired for what has been spent. The courts below have treated this expediture as being "on account of capital." While it is conceded that the initial expenditure incurred in raising borrowed capital is not a permissible deduction, being

(1) [1906] A. C. 448, 453.
(2) [1915] A. C. 433, 473.
(3) (1932) 16 Tax Cas. 260.

itself capital expenditure, the present expenses were incurred solely for the purpose of reducing the interest charges, although, in a sense, they were an outlay *in connexion with* the companies' loan capital. The purpose of a business expenditure must be looked at, no matter in what form the transaction is carried out. The principle laid down in *Usher's* case (1) is accurately summarized in Shaw & Baker on the Law of Income Tax, p. 146, and the passages there are adopted as part of this argument. *Income-Tax Commissioner* v. *Maharajadhiraj of Darbhanga* (2) is in principle the same as the present case, and adopts the principle that expense incurred in preventing a loss is itself a sum incurred for the purpose of earning income. If it can be shown that the present expenditure was incurred for the purpose of reducing a trading expense and was not capital expenditure, then it is allowable. A comparison of the Imperial and the Canadian Acts shows that the same principle arises under each: *Minister of National Revenue* v. *Dominion Natural Gas Co., Ld.* (3); *Arizona Copper Co.* v. *Smiles* (4); *Texas Land and Mortgage Co.* v. *Holtham* (5); *Anglo-Continental Guano Works* v. *Bell* (6); and *Farmer* v. *Scottish North American Trust, Ld.* (7). *Anglo-Persian Oil Co.* v. *Dale* (8) was not brought to the attention of the Supreme Court either in the present case or in the *Natural Gas* case (3). The last-mentioned case was wrongly decided or can be distinguished. From the reasoning in the authorities cited the Chief Justice arrived at the view that the present expenditure is in respect of capital within the meaning of s. 6 (*b*) of the Act. What s. 6 (*b*) prohibits is any outlay, loss or replacement of capital, and not sums incurred in respect of those things. Lastly, the overlapping interest cannot be a capital expenditure, yet it has been disallowed. The view of Rinfret J., who said that all these transactions were inseparable, was right. The deductions claimed were disbursements wholly, exclusively and necessarily laid out and expended for the purpose of earning income.

Cyril King K.C. and *Heyworth Talbot* for the respondent. Three propositions, taken together, destroy the case for the appellants. (*a*) On construction of the Act interest payable

(1) [1915] A. C. 433, 473.
(2) (1941) L. R. 69 I. A. 15.
(3) [1941] S. C. R. (Can.) 19.
(4) (1891) 3 Tax Cas. 149.
(5) (1894) 3 Tax Cas. 255.
(6) (1894) 3 Tax Cas. 239.
(7) [1912] A. C. 118, 127.
(8) [1932] 1 K. B. 124; 16 Tax Cas. 253.

on borrowed capital is not deductible in computing the amount of the profits or gains to be assessed, and, therefore, the profits or gains are computed inclusive of liability for interest. The allowance of interest on borrowed capital is, under s. 5 (*b*) of the Act, only in the discretion of the minister. (*b*) Therefore, the items claimed on these appeals are not disbursements or expenses within s. 6 (*a*). (*c*) It follows from (*a*) and (*b*) that this is not a case of deducting the cost of redeeming or getting rid of a fixed revenue charge, and there is, therefore, no analogy between this case and the *Anglo-Persian Oil Co.'s* case (1), where the commission to the agent was a proper deduction in computing the profits of the trade. Proposition (*a*), if accepted, may dispose of the whole case. The bonded indebtedness of the appellants was part of their fixed capital structure. It was said in *Tata Hydro-Electric Agencies, Bombay* v. *Income Tax Commissioner* (2) that "their Lordships recognize, and the "decided cases show, how difficult it is to discriminate between "expenditure which is, and expenditure which is not, incurred "solely for the purpose of earning profits or gains." It must be expenditure for the purpose of earning profits, and arise out of the relations with persons from whom the profits are derived. Assuming these to be disbursements, they cannot be said to be "wholly, exclusively and necessarily laid out or expended for "the purpose of earning the income." They did not necessarily earn income. The premium on redemption of the outstanding bonds was, no doubt, money expended, but it was a payment on account of capital within s. 6 (*b*). It may also be said to be an outlay of capital. The discount, also, is merely a loss of capital and cannot be an expense in the year in which the discount is suffered. The overlapping interest was not used in the business and it is submitted that it has been excluded by the exercise of the minister of his discretion under the section. The repercussions of the appellants' propositions, if upheld, may go a very long way. None of the expenses in question was a disbursement for the purpose of earning the income of the appellants, and the deduction is, therefore, prohibited by s. 6 (*a*) of the Act. The items were outlays, losses or payments on account of capital, and deduction thereof is prohibted by s. 6 (*b*) of the Act.

Tucker K.C. replied.

(1) [1932] 1 K. B. 124; 16 Tax Cas. 253.

(2) [1937] A. C. 685, 695.

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May 3. The judgment of their Lordships was delivered by LORD MACMILLAN, who stated the facts and continued: It is important to attend precisely to the language of s. 6. If the expenditure sought to be deducted is not for the purpose of earning the income, and wholly, exclusively and necessarily for that purpose, then it is disallowed as a deduction. If the expenditure is a payment on account of capital it is also disallowed. The appellants say that the outlays in question were made wholly, exclusively and necessarily for the purpose of earning income and were not payments on account of capital. The respondent maintains the contrary.

The justification for upholding the deductions claimed could not be more attractively presented than it is in the judgment of Rinfret J. (now Chief Justice of Canada) with which Taschereau J. concurred. The learned judge says: " There are two " ways of increasing the profits from a trade or commercial or " other calling: either by increasing the earnings while the " expenses remain the same, or by decreasing the expenses " while the earnings remain the same. Of course, if the " expenses diminish at the same time as the gross earnings are " increased, the profits will be correspondingly larger, and the " proposition just mentioned is only made more evident. . . . " In order to pay a lower interest and to get rid of the exchange " rates, it was necessary to redeem the original bonds; and, " therefore, the expenses required to achieve that result were " wholly, exclusively and necessarily laid out or expended for " the purpose of decreasing the fixed interest and exchange " charges, and, accordingly, ' for the purpose of earning " ' the income' " (1). Down to the last nine words quoted the statement of Rinfret J. is unexceptionable, but their Lordships are unable to accompany him in leaping the last fence. If the statute permitted the deduction of expenditure incurred for the purpose of increasing income the appellants might well have prevailed, but such a criterion would have opened a very wide door. It is obvious that there can be many forms of expenditure designed to increase income which would not be appropriate deductions in ascertaining annual net profit or gain. The statutory criterion is a much narrower one. Expenditure, to be deductible, must be directly related to the earning of income. The earnings of a trader are the product of the trading operations which he conducts. These operations involve outgoings as well as receipts, and the net profit or gain which the trader earns is the balance of his trade receipts over his trade outgoings. It is not the business of either of the appellants to engage in financial operations. The nature of their businesses is sufficiently indicated by their titles. It is to those businesses that they look for their earnings. Of course, like other business people, they must have capital to enable them to conduct their enterprises, but their financial arrangements are quite distinct from the activities by which they earn their income. No doubt, the way in which they finance their businesses will, or may, reflect itself favourably or unfavourably in their annual accounts, but expenditure incurred in relation to the financing of their businesses is not, in their Lordships' opinion, expenditure incurred in the earning of their income within the statutory meaning. The statute, in s. 5 (*b*), significantly employs the expression " capital used in the business to earn the income." differentiating between the provision of capital and the process of earning profits.

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(1) [1942] S. C. R. (Can.) 100, 102.

A faint suggestion was made that the item for overlapping interest might be differentiated from the other items of expenditure in view of the fact that interest on borrowed money is a permissible deduction at such rate as the minister may allow, but the overlapping interest was paid as part of the cost of the refunding operations and on money borrowed temporarily in excess of what was required for the purposes of the businesses during the overlapping period, and was thus properly disallowed by the minister.

It was conceded in the courts in Canada, and, in any event, it is clear, that the expenses incurred by the appellants in originally borrowing the money represented by the bonds subsequently redeemed were properly chargeable to capital and so were not incurred in earning income. If the bonds had subsisted to maturity the premiums and expenses then payable on redemption would plainly also have been on capital account. Why, then, should the outlays in connexion with the present transactions, compendiously described as " refunding operations," not also fall within the same category ? Their Lordships are unable to discern any tenable distinction. In the history of both companies the financial re-adjustment of their borrowed capital was an isolated episode, unconnected with the day to day conduct of their businesses, and the benefit which they derived was not " earned " by them in their businesses. In the courts in Canada the deductions claimed were held to be struck at both by para. (*a*) of s. 6 as not being expenditure for

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the purpose of earning the income and by para. (*b*) as being payments on account of capital. It may well be that items of expenditure may be open to both objections. The first objection, which their Lordships uphold, is sufficient for the disposal of the cases, but their Lordships in no way dissent from the view that the second objection also applies.

Reference was made in the course of the argument for the appellants to a number of reported cases, chiefly on the analogous provisions of English, Dominion and Indian revenue statutes. In some of these cases attempts were made to formulate principles of discrimination among different kinds of expenditure, permissible or prohibited as deductions. They illustrate the diversity of the problems which may arise. Their Lordships do not on the present occasion find it necessary to discuss these authorities as, in their opinion, the particular expenditure with which they have to deal falls clearly within the statutory prohibition against deduction. Their Lordships will, accordingly, humbly advise His Majesty that the consolidated appeals be dismissed, and the judgments of the Supreme Court of Canada be affirmed. The appellants will pay the respondent's costs of the present appeal.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondent: *Charles Russell & Co.*

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Mar. 1, 2, 6, 7; *April* 3.

REVILLE, LIMITED . . . . . . APPELLANTS;

AND

PRUDENTIAL ASSURANCE COMPANY LIMITED . . . . RESPONDENTS.

Emergency legislation—War damage—Ground lease—Notice of retention—Reduced rent—Date from which reduction should operate—County court—Application by lessors for determination whether lessees should be allowed to exercise right of retention of lease as multiple

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* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN and LORD PORTER.

lease—Alternative application to court to fix period in respect of which reduced rent payable—Withdrawal by lessors of first application —Duty of county court judge—Landlord and Tenant (War Damage) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *s.* 10, *sub-s.* 1 (*c*), *s.* 15*—Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 41), *s.* 2, *sub-s.* 5; *s.* 10, *sub-ss.* 1, 2; *Sch.—County Court Rules,* 1936–1941, *Or.* 15, *r.* 6.

In 1940, premises let on a lease which was both a ground lease and a multiple lease within s. 24 of the Landlord and Tenant (War Damage) Act, 1939, suffered war damage within the meaning of that section. Under the Landlord and Tenant (War Damage) (Amendment) Act, 1941, which became law on August 7, 1941, a tenant under a ground lease became entitled to serve on the lessor a notice of retention of that lease. On November 21, 1941, the lessees served a notice of retention on the lessors. On December 18, 1941, the lessors applied to the county court under s. 15 of the Act of 1939, as amended by s. 2, sub-s. 5, of the Act of 1941, and the schedule thereto, for an order that the lessees should not be allowed to exercise the right of retention, and alternatively, for an order under s. 10, sub-s. 1 (*c*), of the Act of 1939 that part of the premises was capable of beneficial occupation and for directions for payment of the rent of 2,000*l*. It was subsequently agreed between the parties that part of the premises was capable of beneficial occupation and that the lessees should pay a reduced rent in respect of that part. It was a matter of contest whether the reduction should operate from the date of the damage or from that of the service of the notice of retention. In the county court the lessors abandoned the first portion of the application, and the judge held that they were entitled to do so under Or. 15, r. 6, of the County Court Rules, 1936–41. Dealing with the application under s. 10, he fixed the reduced rent as payable from the date of the notice:—

Held, that under the proviso to s. 15, sub-s. 5, of the Act of 1939, there was no discretion in the judge to fix a date earlier than that of the service of the notice of retention.

Per Viscount Simon L.C. and Lord Atkin. The application before the judge was not within the scope of Or. 15, r. 6, which deals with the right of a plaintiff to abandon part of his claim in an action, and, accordingly, the appeal must be dealt with on the assumption that the lessees were entitled to require the judge to act under s. 15.

Decision of the Court of Appeal (sub nom. *Prudential Assurance Co., Ld.* v. *Reville, Ld.*) [1943] K. B. 448 affirmed.

APPEAL from the Court of Appeal.

The facts stated by Viscount Simon L.C., Lord Russell of Killowen and Lord Porter were as follows. By a lease, dated March 25, 1907, the respondents let to the predecessor of the appellants, who were at all material times the assignees thereof, premises known as 297 Oxford Street and 15 Hanover Square for ninety-nine years from March 25, 1904, at a rent of 2,000*l.* a year. The lease was a "ground lease" and also a "multiple "lease" within the definitions in s. 24 of the Landlord and Tenant (War Damage) Act, 1939. In September and December, 1940, the premises suffered "war damage" within the definition in that section as the result of enemy action. At that time the Act applied to the lease to the extent that the appellants, by s. 1, sub-s. 1, were relieved from any liability to make good the war damage, which would otherwise have rested on them under the repairing covenants in the lease, but, inasmuch as the lease was a "ground lease," the appellants were "not entitled to serve a notice of retention" (s. 13, sub-s. 2), and they did not apply for leave to disclaim the lease under s. 13, sub-s. 3. The rent, therefore, remained payable in full, notwithstanding the war damage, but none of it was in fact paid. The appellants took no steps to make the premises tenantable, but early in 1941 the premises were requisitioned by the Crown, which proceeded to make the greater part of them fit for use. On August 7, 1941, while this work was in progress, the Landlord and Tenant (War Damage) (Amendment) Act, 1941, was passed, and, by s. 10, sub-s. 1, the Act of 1939 was made to "apply to ground leases in like "manner as it applies to other leases." By s. 10, sub-s. 2, a notice of retention might be served in respect of war damage comprised in a ground lease. The appellants did not at once give such a notice, but awaited the completion of the repairs which the Crown had undertaken. By November, 1941, the repairs, so far as they were then carried out, had been finished, only one floor being left in a damaged condition. No previous notice having been served by either party, the appellants, on November 19, 1941, signed a notice of retention of the whole premises, and that notice was received by the respondents on November 21, 1941. On December 18, 1941, the respondents applied under s. 15 of the Act of 1939, as amended by s. 2, sub-s. 5, of the Act of 1941, and the schedule thereto, to the Westminster county court for an order or declaration that the appellants "be not allowed to exercise the right of retention "either as respects the lease as a whole or as respects one or "more of the separate tenements comprised therein and for "directions that the land comprised in the lease shall not be "deemed to be unfit for the purposes of the above-mentioned "Acts and that the said notice of retention shall cease to "have effect. . . . In the alternative we apply for an order "or declaration under s. 10, sub-s. 1 (*c*), of the Act of 1939 "that the said premises other than the upper part of "No. 297 Oxford Street, fronting Oxford Street were, on "November 21, 1941, and are capable of beneficial occupation "and for directions for payment by the [appellants] to the "[respondents] as from November 21, 1941, of the rent of "2,000*l*. reserved by the said lease." Before the respondents' application came on to be heard in the county court there were negotiations and correspondence between the parties and their surveyors which established that until the war damage was made good the appropriate rent for the part of the premises capable of beneficial occupation was 1,600*l*. a year, i.e., a reduction of 400*l*. a year from the rent reserved by the lease. The only remaining question was from what date the reduced rent should apply. In a letter which the appellants' solicitors wrote to the respondents' solicitors on July 1, 1942, they stated that their clients "will claim that the proviso to "sub-s. 5 [of s. 15 of the Act of 1939] applies to the facts of "the case and that it is equitable, having regard to the extent "of the war damage suffered by the land, that the rent "reserved by the lease shall, until the war damage is made "good, be reduced to the extent of 400*l*. per annum as from "the date of the said war damage." The respondents contended that the full rent was payable until service of the notice of retention, i.e., November 21, 1941, and that the reduced rent of 1,600*l*. should run from that date. The negotiations between the parties took some time to complete, and the respondents' application did not come on for hearing in the county court until October 9, 1942. The respondents' counsel then announced that they withdrew their application under s. 15 and took their stand only on s. 10. The judge thought that he was bound to permit this, treating the withdrawal as an exercise of the right conferred by Or. 15, r. 6, of the County Court Rules, 1936–1941, and holding that the respondents were entitled as of right to take that course so that in effect he had no discretion in the matter. At the same time, acting under s. 10, he ordered payment of a reduced rent of 1,600*l*. from November 21, 1941. The respondents having appealed, the Court of Appeal held that, whether s. 10 or s. 15 were regarded as the source of their rights, the reduction of rent to which they were entitled could only operate as from the date of the service of the notice of retention. The court

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further held that the judge was wrong in refusing to consider the effect of s. 15. The appellants appealed to the House of Lords.

M. Turner-Samuels and *C. Joseph* (for *D. Turner-Samuels* on war service) for the appellants. The judge should have heard and determined the matter under s. 15 of the Act of 1939 as amended, for Or. 15, r. 6, of the County Court Rules did not apply. There being an application under s. 15, s. 10, sub-s. 1 (*c*) of the Act of 1939 does not apply. The court must have regard to the extent of the war damage as directed by the proviso to sub-s. 5 of s. 15, taking it into account as from the date of the damage. The court has power to fix a reduced rent for a period ending when the damage is made good, but the period may start from the date when the damage occurred. The proviso had a retrospective effect and did not apply merely from the date of the notice of retention. The modifications in s. 15 indicate that the generality of s. 10 does not apply. Section 15 gives the court a wide jurisdiction to look at all the circumstances and do what is " equitable " : see proviso to sub-s. 5. " Equitable " means fair as between the parties and it is fair to balance the burden between them. It is only under s. 15 that the question of equitability arises, and this is the only section under which an application can be made with regard to a multiple lease. Its effect is to throw the whole matter at large so that the court can go back to the date when the war damage occurred.

Denning K.C. and *Dare* for the respondents. As regards the proceedings in the county court, Or. 15, r. 6, did not allow withdrawal of the claim under s. 15 as of right, since this was not an action. It was, however, a " matter," and the judge had a discretion. The respondents, as applicants, were in the position of dominus litis and should have been allowed to withdraw that claim unless there was any reason to the contrary, as that the appellants had obtained some advantage in the proceedings of which it would have been unjust to deprive them. However, even assuming that the judge had exercised his discretion in favour of the appellants, then, whether regard be had to s. 10 or to s. 15, the reduction in rent cannot operate at a date earlier than that of the service of the notice of retention, namely, November 21, 1941. Till that date the rent of 2,000*l*. a year was payable. It had accrued due and the respondents had a vested right to it. The service of the notice is the real operative point of time. There is no power to relieve a tenant of liability to pay rent before that time. There is nothing retrospective in the proviso to sub-s. 5 of s. 15 so as to enable the court to make an order having a retroactive effect. Two principles apply to its interpretation: (*a*) No retroactive effect should be given to legislation to divest vested rights unless the language is such as plainly to require such a construction: see Craies on Statute Law, 4th ed., pp. 329–32; (*b*) The function of a proviso is that it is not a substantive enactment, but that it operates on what has gone before and must be considered in relation to the principal matter. It cannot be construed as enlarging the scope of the enactment: see *West Derby Union* v. *Metropolitan Life Assurance Society* (1), *Rex.* v. *Dibdin* (2) and Craies on Statute Law, 4th ed., p. 196–7. In the Act of 1939 the words are made sufficiently clear when a retroactive effect is intended. This is not so in the case of the proviso to sub-s. 5 of s. 15. To produce a workable view of the Act it is necessary to treat the proviso as not divesting vested rights. If the appellants' contention were correct, a tenant who had paid his rent throughout the period before the notice would be in a worse position than one who had not. [They referred to *Langford Property Co., Ld.* v. *Pajzs* (3); *Hildebrand* v. *Lewis* (4); *In re Orbit Trust, Ld.'s Leases* (5); *London Fan & Motor Co., Ld.* v. *Silverman* (6); *Turner* v. *Stella Bond, Ld.* (7); and *Ruston & Hornsby, Ld.* v. *Goodman* (8).]

M. Turner-Samuels in reply. It is not a question of whether the proviso to sub-s. 5 of s. 15 has a retrospective effect. The court has to decide what part of the loss caused by the war damage the parties are to bear respectively and has a discretion to do what is equitable between them. In the Act of 1941 Parliament was dealing with the unfairness of the previous position of ground lessees. It was throwing its mind back to a previous period so as to do justice in such cases. The appellants' interpretation of the proviso is a possible one, and, where there are several possible constructions of a statute,

(1) [1897] A. C. 647, 652.
(2) [1910] P. 56, 125.
(3) [1943] W. N. 238; 112 L. J. (K. B.) 657.
(4) [1941] 2 K. B. 135.
(5) [1943] Ch. 144.
(6) [1942] W. N. 56; 167 L. T. 89.
(7) [1941] 1 K. B. 569.
(8) [1933] A. C. 150.

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the one to be adopted is that which best does justice between the parties: *Hill* v. *East & West Indian Dock Co.* (1). This Act must be read in the context of the very special circumstances which brought it into being. It is not right to put any restriction on it as regards any period affected by war damage. *Hildebrand* v. *Lewis* (2) bears only on s. 13 of the Act of 1941 and does not apply to this case.

The House took time for consideration.

April 3. VISCOUNT SIMON L.C. My Lords, on ultimate analysis, the matter on which this appeal turns is the proper construction of the proviso in s. 15, sub-s. 5, of the Landlord and Tenant (War Damage) Act, 1939, as set out in the schedule to the amending Act of 1941, but to reach a correct result it is necessary to examine with care many sections of this complicated legislation. At the hearing before His Honour Judge Sir Gerald Hurst K.C. an unfortunate complication was introduced by the landlords announcing that they withdrew their application under s. 15 and took their stand only on s. 10. The county court judge thought that he was bound to permit this, treating the withdrawal as being an exercise of the right conferred by Or. 15, r. 6, of the County Court Rules. At the same time, acting under s. 10, he ordered a reduced rent of 1,600*l.* from November 21, 1941. As du Parcq L.J.'s judgment delivered for the Court of Appeal points out, this view of Or. 15, r. 6, is a mistake. That rule has nothing to do with the application then before the learned county court judge. It is a rule which refers to actions and to the right of a plaintiff to abandon part of his claim in an action. We must deal with the present appeal on the assumption that the tenants were entitled to urge the county court judge to act under s. 15 and to exercise such discretion as he had under the proviso to sub-s. 5 in their favour.

If, therefore, this discretion left the county court judge with any power to fix a reduced rent for any earlier period, the case must go back to the county court judge.

I agree, however, with the Court of Appeal, for the reasons set out by du Parcq L.J., that the county court judge had no discretion to go back earlier than the date of service of the notice. A proviso should, if possible, be read as operating

(1) (1884) 9 App. Cas. 448, 456. (2) [1941] 2 K. B. 135.

within the ambit of the main clause which it is introduced to qualify. Here the main provision in sub-s. 5 has to do with the nullifying of a notice of disclaimer, notice of retention, or notice to elect, and the court has power to direct that such a notice shall " cease to have effect," but the effect of serving a notice of retention (to take the example involved in this case) is to stop liability for rent under the lease " in respect " of the period beginning with the date when the notice " was served or is deemed to have been served" : (s. 10, sub-s. 1 (*b*)). The liability for rent before that period remains the same whether the notice continues to have effect or not. Again, under s. 10, sub-s. 1 (*b*), the most favourable order which the tenants can obtain from the court is an order that no rent shall be payable " in respect of the period beginning with the " date when the notice was served." Moreover, there is nothing whatever in the legislation to provide for the return of rent already paid or to cancel the liability for rent previously accrued, so that the inference is strong that the proviso is not intended to go back to an earlier period when the rent was payable and, it may be, paid in full, but gives the court a discretion to order a reduced rent as from a date not earlier than that of service of the notice which it has decided should " cease to have effect." (These last words seem to me to suggest the possibility that the order for reduced rent in the proviso might have as its starting point the date of the court's direction, and not the date of the service of the notice which is being nullified, but no such point appears to have been taken below, and I mention it only to reserve it.) I thus find myself in agreement with the conclusion reached by the Court of Appeal and I move that this appeal be dismissed with costs.

My noble and learned friend, LORD ATKIN, authorizes me to say that his view agrees with the opinion which I have expressed.

LORD THANKERTON : My Lords, I concur. I have had the opportunity of considering the opinion of my noble and learned friend, Lord Russell of Killowen, and he has so precisely expressed my views that I am content to agree with his opinion and to refrain from restating them.

LORD RUSSELL OF KILLOWEN (read by LORD THANKERTON). My Lords, In this case the tenant of a multiple lease at a yearly rent of 2,000*l.* served on the landlord (on November 21, 1941) a notice of retention, under s. 4 of the Landlord and Tenant (War Damage) Act, 1939, and the only question for our determination is whether, if the court had thought fit to exercise the power conferred on it by the proviso to sub-s. 5 of the modified s. 15 of that Act, it could order that the rent reserved by the lease should be reduced as from a date earlier than the date of the service of the notice of retention. That this is the only question is the result of an arrangement come to between the parties to the effect that a reduced rent of 1,600*l.* per annum should be payable as from the service of the notice. That the reduced rent should be payable from that date was common ground between the parties. The appellants, however, claimed in addition that the reduced rent should date back to and be payable from the date when the war damage was inflicted, viz. in September, 1940. These facts appear from the correspondence, and, in particular, from a letter which the appellants' solicitors wrote to the respondents' solicitors on July 1, 1942, in which they state that their clients (I now quote the letter) " will claim that the proviso to sub-s. 5 " applies to the facts of the case, and that it is equitable, " having regard to the extent of the war damage suffered by " the land, that the rent reserved by the lease shall, until the " war damage is made good, be reduced to the extent of 400*l.* " as from the date of the said war damage." The effect of this claim would be that rent at the reduced rate would be payable throughout the period mentioned, and that the appellants' liability for the full rent up to the date of the service of the notice would be modified to the extent indicated.

I feel no doubt that the court has no power under the proviso to reduce the rent as from the date of the war damage. The lease is to " have effect " subject to the modifications specified in s. 10 of the Act of 1939. The liability under the lease for the full rent up to the service of the notice remains in force. There are no words in the proviso (or elsewhere) purporting to destroy the landlord's vested right to that rent, or enabling that rent (if already paid) to be recovered by the tenant in the event of a reduction being ordered. Such a provision, applicable to different circumstances, is, however, to be found in express terms in s. 13 of the amending Act of 1941. Further, the proviso is a qualification of sub-s. 5, and it must be read in that light and not as an independent or substantive enactment. So read, the position is that sub-s. 5

gives the court a power which, if exercised, restores the tenant's liability to pay the full rent during the period of exemption referred to in s. 10, sub-s. 1 (*b*), of the Act of 1939. Whether the liability is restored in respect of the whole of that period, or only in respect of the time subsequent to the court's order, is a question which we need not determine. In either event, however, it is a power the exercise of which restores the tenant's liability to pay the full rent only as from the date of service of the notice or as from some later date. The proviso, if read as it should be read, merely as a proviso to sub-s. 5 only gives a power to mitigate that liability. To construe the proviso as conferring a power to mitigate a different and larger liability, viz. the tenant's liability for rent in respect of a time antecedent to that period, is to treat it, not as a proviso, but as a substantive enactment. The result is that in no event can the court under the proviso reduce the rent reserved by the lease as from a date earlier than the service of the notice of retention. Whether the court can, under the proviso, reduce the rent as from the date of that service, does not arise on this appeal. As at present advised, my opinion is that, on the true construction of the proviso, the reduced rent can only run from the date of the order made, or it might be from the date of the application, in which case the tenant's freedom from rent might continue until the reduced rent commenced to run, but I would prefer to keep the matter open and to confine our decision to the particular circumstances of this case by holding that, whatever be the true construction of the proviso, the reduction of rent thereunder cannot relate back to a date earlier than the date of the service of the notice of retention.

A contention was advanced by counsel for the appellants that, if the court could not, under the proviso, order the reduced rent to run as from the date of the war damage, it could do so indirectly by making such an increased reduction during the period over which it had control as would, in its opinion, compensate the tenant and do justice between the parties. I cannot adopt this view, if for no other reason because, in view of the fact that the period of reduction is a period of uncertain duration, it would be impossible for the court to determine by what amount the reduction should be increased. I would dismiss this appeal.

LORD PORTER (read by LORD MACMILLAN). My Lords, the respondents' application came before the county court on October 9, 1942. On that occasion the respondents' counsel sought to withdraw the application under s. 15 and to rest his case solely on s. 10. To this withdrawal the county court judge acceded, holding that under Or. 15, r. 6, of the County Court Rules the respondents were entitled as of right to take that course and, in effect, that he had no discretion in the matter. On appeal, however, the Court of Appeal held that his decision was wrong, and in your Lordships' House the respondents' counsel did not seek to uphold the view of the county court judge. He admitted that at best the judge had a discretion whether he would allow the respondents to withdraw and that, unless the case were to be sent back on this point, he must argue it as if the county court judge had exercised his discretion in favour of the appellants and had dealt with the application made under s. 15. Your Lordships, I understand, agree that this concession was rightly and necessarily made and that the effect of s. 15 must be taken into consideration. Having regard to the position so reached, it becomes unnecessary to decide whether the appellants were entitled to insist on the application under s. 15 being heard, or whether the county court judge could in his discretion hear it or refuse to hear it. Your Lordships, therefore, have to determine the matter on the basis that the application under s. 15 was a living issue.

My Lords, in these circumstances I agree with the Court of Appeal that it is necessary to review the general structure of the Acts in order to ascertain their true meaning. In the case of a non-multiple lease I think it is plain that rent remains payable in full until notice of retention or disclaimer is given, subject, however, to the qualification that where notice of disclaimer is given the court is empowered under s. 9, sub-s. 1, to substitute some other date (if there is reason for doing so) as from which the lease is to be determined and the obligation to pay rent is to cease. Subject to this qualification, not only is the date prescribed at which rent ceases to be due, i.e. on the service of the notice, but so also is the date when it again becomes payable, viz. when the premises cease to be unfit. The only qualifications on this provision which I can see are (1.) that if, after the notice of retention, but before the premises are rendered fit, it can be shown that part of the premises can be beneficially occupied, the court is empowered to fix an appropriate rent payable " at such times and in respect "of such period as the court shall fix"; and (2.) that if the tenant, who, by reason of his notice is under a duty to make the premises fit as soon as reasonably practicable, neglects to do so, the court has the like power of fixing an appropriate rent in respect of the period after the premises ought to have been repaired. All these provisions, however, are subject to the parties' right as set out in s. 6 to have it determined whether or not the premises were really unfit at the time when the notice was given. If this right is exercised and the premises are declared not to have been unfit, full rent is payable so long as the lease endures. If, however, the right is not exercised the premises are "deemed to have been unfit." These provisions deal with the case of single leases. When, however, multiple leases come in question other provisions apply. In their case the court is given not only the alternative of deciding whether they are fit or unfit in whole or in part, but also, without having to make up its mind whether they are fit or unfit, of deciding whether it is equitable that they should be deemed to be unfit and what rent should be payable in that event.

These powers are given to the county court by s. 15 of the original Act, as amended by the schedule to the Act of 1941. The amended section in effect gives the court the choice of three courses: (1.) To determine whether the tenant shall be entitled to disclaim or retain the lease as a whole, in which case any notice previously given is to stand. (2.) To determine whether the tenant shall be entitled to disclaim or retain part of the premises contained in the lease and to retain or disclaim the other part, in which case any earlier notice is to be discharged and a fresh notice may be given immediately. (3.) If not satisfied that it is equitable to allow the tenant to exercise any of the rights set out above in (1.) and (2.), to direct that the land comprised in the lease shall not be deemed to be unfit. In the last-mentioned case the section goes on to say that "the court shall direct that any notice of "retention . . . . relating thereto" (i.e. to the premises) "shall cease to have effect." It was under this last provision that the appellants desired the county court judge to exercise his jurisdiction and to declare that the notice of retention given on November 21, 1941, should cease to have effect. It is to be observed that in all the alternative remedies given under s. 15 the question is not, as it is under s. 10, whether the premises were in fact fit or unfit, but whether they shall be deemed to be unfit or not unfit, and whether, having regard to the equitable considerations set out in the section, the tenant should be allowed to enjoy the benefit of one or other of the various remedies given by the Acts.

The final alternative, however, is subject to the proviso on which the dispute in the present case primarily turns. "Provided," it says, "that the court may, if having regard "to the extent of the war damage suffered by the land it "considers it equitable to do so, order that the rent reserved "by the lease shall, until the war damage is made good, be "reduced to such extent as may be specified." The appellants maintain that this wording enables the county court judge to reduce the rent from the date of the war damage. In the respondents' contention the earliest date from which it could possibly do so would be the date of the notice of retention. For their purpose it was unnecessary to argue whether some later moment should not be chosen. In terms the proviso does not state the date as from which the rent shall be reduced, and it differs from the provisions of s. 10 in that the reduction continues until the war damage is made good, not until the premises are, or some portion of them is, made fit. This latter change is, I think, necessarily made because the question under s. 15 is not whether the premises are fit or unfit, but whether they shall be deemed not to be unfit. It is impossible to stipulate a time by which premises deemed to be not unfit shall be made fit, but it is possible to ascertain when the war damage has been made good. The proviso is in very wide terms, and if it were a substantive enactment and made alone it might be held to enable the court to reduce the rent as from any moment, though, having regard to the reference to making good the war damage, no earlier date than its occurrence could, I think, be chosen. The proviso, however, does not stand alone. It is a qualification on sub-s. 5 of s. 15 and must be so construed.

Section 10, sub-s. 1 (*b*) provides that no rent shall be payable in respect of the premises by the tenant from the date when the notice of retention is served, subject to the right of the court on the application of the landlord to direct the payment of some rent where part of the premises, but not the whole, has been made capable of beneficial occupation. Plainly the power of the court under the last part of that section is limited to a time after the notice of retention is given. Before that date the rent was payable in full and no necessity existed for directing the payment of some lesser sum. Section 15 only interferes with the provision that rent shall cease when notice of retention is given to the extent that it enables any person interested to apply to the court to determine whether the tenant should be entitled to exercise the right of retention or not. On this application, under the terms of sub-s. 5, the court, if not satisfied that it is equitable to allow the tenant to exercise the right of retention, shall direct that the land shall not be deemed to be unfit, and that any notice of retention . . . . shall *cease* to have effect. It does not say that the notice is of no effect, as was said in s. 6. Indeed, the use of the word " cease " indicates that the notice must at one time have been effective, but at some later time is to cease to be so. Exactly when it is to cease to have effect is not specified. It may be on the date of the court's order, or, possibly, it may be antedated to the time of the application. I do not find it necessary to suggest when that moment should be. One thing, I think, is clear, that at earliest it could not be before the date of the service of the notice. So long as there was an effective notice no rent was payable, and during that period there could be no reduction of rent. Nor do I think that the court could order a reduction before the notice of retention was given. The whole scheme of the Act appears to turn on the giving of some notice. Except for the provision exempting a tenant from his obligation to repair, the Act does not begin to work until one or other of the notices, which it permits, is given. The tenant has his option. He can lie by, taking advantage of his freedom from the duty to repair, or he can give notice either to disclaim or retain the lease. In the latter case he may escape the payment of further rent, but in case he gives notice of retention he comes under an immediate obligation to repair as soon as reasonably practicable. On the other hand, he can avoid that responsibility, but only by continuing to pay the rent in full.

Section 15, it is true, modifies in some degree the provisions of s. 10, but only to the extent of adapting its terms to multiple leases. Under either section no rent is payable while the notice of retention is in force. If the notice were of no effect because the premises never were unfit, the full rent would be payable throughout the term. If, on the other hand, they were at one time unfit, but had again been made fit, rent would again become payable in full and the notice cease to have effect from that moment. So, when, under the

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amended s. 15, the land is deemed not to be unfit, rent is payable from the moment the notice of retention ceases to have effect. That liability is, of course, subject to any agreement between the parties as to the period over which it is payable and the amount to be paid. If, however, there be no agreement, it is subject to the right of the court to fix the sum which is to be paid from some date which, as I have given reason to show, cannot be earlier than the date of the notice of retention, and may well be later. It follows that in this case the learned county court judge could in no event have antedated the reduction in rent to a period before the notice of retention. After that date the parties have come to an agreement. The appellants are, therefore, wrong in their contention, and the appeal should, in my opinion, be dismissed.

Appeal dismissed.

Solicitors for appellants: *Cohen & Cohen.*
Solicitor for respondents: *C. H. Browne.*

GALOS HIRED AND ANOTHER . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

J. C.*

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May 18.

ON APPEAL FROM THE PROTECTORATE COURT OF APPEAL OF THE SOMALILAND PROTECTORATE.

Somaliland—Criminal law—Poor persons defence—Assignment of advocate—Unavoidable absence—Appeal not effectively heard—Poor Persons Defence Ordinance (No. 26 of 1939), s. 3, sub-s. 2.

Where, pursuant to sub-s. 2 of s. 3 of the Poor Persons Defence Ordinance, 1939, an advocate was assigned to the appellant "for "the preparation and conduct" of his appeal against his conviction of murder, and the advocate, through no default on his part, was unable to reach the court in time to conduct the appeal, which was conducted by the appellants in person and dismissed:—

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* *Present:* Viscount Maugham, Lord Thankerton and Sir Madhavan Nair.

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Held, that, the appeal had not been effectively heard and must be restored for hearing in circumstances which would enable an advocate to conduct it.

Appeal (No. 29 of 1943), by special leave, from a judgment of the Protectorate Court of Appeal of the Somaliland Protectorate (June 26, 1942), dismissing the appellants' appeal from a judgment of the Protectorate Court, sitting as a court of first instance (March 18, 1942), whereby the appellants were each convicted under two charges of murder under ss. 34 and 302 of the Indian Penal Code, which is applicable to the Somaliland Protectorate, and were sentenced to death. The only question in this appeal was whether the hearing in the Court of Appeal was illegal on the ground that it contravened the provisions of s. 3, sub-s. 2, of the Poor Persons Defence Ordinance, 1939, which provides that: "Any such accused person to whom an "advocate has been assigned under the provisions of sub-s. 1 "of this section, shall, if convicted at such trial, be entitled, "on his lodging an appeal with the Protectorate Court of "Appeal, to have an advocate assigned to him for the "preparation and conduct of such appeal."

The following facts are taken from the judgment of the Judicial Committee. The appellants were charged in the Protectorate Court of the Somaliland Protectorate that on or about the first week in June, 1941, at Harawati Balleh, near Bohadle in the district of Burao, Somaliland, each of them did participate in a criminal act, namely, intentionally causing the death of Corporal Nur Musa, done by several persons in furtherance of the common intention of all, and thereby committed the offence of murder, punishable under ss. 34 and 302 of the Indian Penal Code. The trial took place in February, 1942, before Captain George Paterson, legal secretary, acting as judge of the Protectorate Court, and three assessors who were akils (members of a native court). Nine persons had been charged, but one was too ill to be tried. All the defendants pleaded Not Guilty, the appellant, Mohamed Ibrahim, relying on an alibi and calling two witnesses in support of it. Mr. Manilal, barrister-at-law, was retained by the government to defend the appellants (among others) at the trial, and he conducted their defence. A number of witnesses were called. The judge, at the conclusion of the trial, addressed the three assessors who all expressed the opinion that the appellant, Mohamed Ibrahim, was not present

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(accepting his alibi), one of them expressing the view that it was his brother who had been taken for him. All three assessors expressed the opinion that the appellant, Galos Hired, took part in the killing of Nur Musa. The judge found both appellants guilty of murder under the provisions of ss. 34 and 302 of the Indian Penal Code, and sentenced them to death. They were then informed of their right to appeal and the time within which it was to be lodged. The other accused persons were acquitted. The appellants duly appealed from the conviction and sentence to the Protectorate Court of Appeal which has very wide powers amounting, in effect, to a re-hearing. Mr. Manilal was again instructed by the government to appear as advocate for the appellants on the appeal, but, owing to shipping difficulties, was not able to land in British Somaliland from Aden before July 2, 1942, and the appeal was heard by the Appellant Court on June 22, 1942, in the absence of counsel. The appellate judge heard the appellants in person and decided the appeal on a consideration of the record of the case, the judgment of the trial judge, and the petition of appeal which had been submitted by Mr. Manilal. The appellate judge dismissed both appeals. The sentences of death were subject under the law to the confirmation of the military governor. The sentences of death were confirmed by Major E. P. S. Shirley (Acting Secretary to the Government) by command of the military governor on June 26, 1942. Special leave to appeal against the judgment of the Protectorate Court of Appeal was granted by His Majesty in Council on August 10, 1943.

1944. April 24. *Casswell K.C.* and *Khambatta* for the appellants. The hearing before the appellate court was illegal because there was a denial of the accepted principles of justice and a contravention of the express provisions of sub-s. 2 of s. 3 of the Poor Persons Defence Ordinance, 1939. That ordinance is for the protection of the native, and assignment of an advocate for the conduct means for the actual conduct of the appeal. The appellate court ought not to have proceeded with these native appellants appearing in person. The sub-section gives a positive right. There is no question of discretion. In the absence of the intended effective protection, there has been no appeal. The appeal has not been validly disposed of.

Sir Donald Somervell A.-G. and *Preedy* for the Crown. It would be difficult to say that there is anything contrary to natural justice in an appellate court dealing with an appeal without having a barrister to argue it. The appeal court here had before it carefully drawn-up documents setting out the grounds of appeal in respect of both appellants and would, therefore, be satisfied that all the points were before the court. It is not contended that the procedure was wholly satisfactory, and perhaps the court ought to have exercised its discretion by adjournment, but that does not invalidate the appeal. There appears to be no authority in this country where some departure from the poor prisoners' defence procedure has been suggested as invalidating the proceedings. Under s. 16 of the Court of Criminal Appeal Act, 1907, however, "shorthand notes shall be taken of the proceedings at the "trial of any person on indictment who, if convicted, is "entitled . . . . to appeal under this Act. . . ." That would appear to be mandatory, but in *Rex* v. *Rutter* (1) it was held that the provision of s. 16 was merely directory, and that the taking of a shorthand note was not essential to the validity of the proceedings. Similarly, in *Rex* v. *Elliott* (2) it was said that s. 16 was directory only and that the absence of a shorthand note did not in itself entitle an appellant to have the conviction set aside. The Poor Persons Defence Ordinance is directed, like our own poor prisoners' defence procedure, to seeing that, so far as legal assistance is concerned, the poor person has not suffered for his poverty. It ought not to be construed as affecting the validity of the proceedings. Where a poor person has had an advocate assigned to him under this procedure and the latter for any reason fails to appear, the position, so far as concerns the validity of the proceedings, is the same as it would be in the case of an ordinary paying litigant. It is a question for the discretion of the court, which, under s. 309 of the Somaliland Protectorate (Administration of Criminal Justice) Ordinance, 1930, has jurisdiction to proceed with an appeal without an advocate being there, although it must have the accused present and give him an opportunity of being heard. It is not right in the present case, where the letter of the section was complied with by an advocate being assigned, though he did not appear, where it was desirable that the matters should be dealt with expeditiously, and there was no other

(1) (1908) 25 T. L. R. 73.

(2) (1909) 25 T. L. R. 572.

advocate in the territory who could be assigned, and where the judge took great care to hear what the accused said, and had himself read the record, that the appeal should be invalidated. Should, however, this appeal succeed, it is submitted that the proper order is that there is an appeal which has not been disposed of.

Casswell K.C. replied.

May 18. The judgment of their Lordships was delivered by VISCOUNT MAUGHAM, who stated the facts and continued: The main ground of the appeal is that there has been no proper hearing of the case before the Protectorate Court of Appeal for the reason that the counsel assigned to the appellants was, in the circumstances to be next mentioned, unable to appear at the hearing and to conduct the appeal. The Poor Persons Defence Ordinance (No. 26 of 1939), s. 3, provides as follows: "(1.) Where it appears, for any reason, "that it is desirable, in the interests of justice, that an accused "person should have legal aid in the preparation and conduct "of his defence at his trial and that his means are insufficient "to enable him to obtain such aid—(*a*) a certifying officer "upon the committal of the accused person for trial; or "(*b*) a certifying officer at any time after reading the "depositions recorded in any inquiry held under c. XVI. of "the Administration of Criminal Justice Ordinance into any "of the offences specified in the schedule hereto; or "(*c*) a certifying officer upon the framing of a charge against "a native on trial for an offence against s. 304 of the Indian "Penal Code or an attempt at, or the abetment of, such "offence, may certify that the accused person ought to have "such legal aid, and if it is possible to procure an advocate, "such accused person shall be entitled to have an advocate "assigned to him. (2.) Any such accused person to whom an "advocate has been assigned under the provisions of sub-s. 1 "of this section, shall, if convicted at such trial, be entitled, "on his lodging an appeal with the Protectorate Court of "Appeal, to have an advocate assigned to him for the "preparation and conduct of such appeal."

It appears that Mr. Manilal, who is a barrister-at-law enrolled to practise as an advocate of the Supreme Court of the Colony of Aden and permanently practising in that colony, is the only person enrolled to practise in British Somaliland and has been in that position for some four years. He has to travel by sea from Aden to Somaliland when required by the British Somaliland government to defend accused persons on trial on capital charges, and he was retained by that government to defend the appellants both in the trial court and, again, on the appeal, which he was told would take place on June 22, 1942, at Hargeisa. The government had been in the habit of asking the Movement Control Office to arrange passages for Mr. Manilal when his presence as counsel was required, but owing to the war there was no shipping available between Aden and British Somaliland by which Mr. Manilal could arrive on June 22 as instructed, and, in fact, the authorities in British Somaliland, being well aware of the position, had written to him to make any other possible arrangements if there happened to be any chance shipping. The difficulty of the passage across the Gulf of Aden was well-known, and on some previous occasions the Protectorate Court of Sessions had adjourned a hearing in order that Mr. Manilal should have time to come to Somaliland. No steamship accommodation was, in fact, available for the journey so as to enable him to appear on June 22, 1942, and it is not suggested that he could be expected to come by a native dhow or similar vessel at this time. However, the case was called on on June 22, 1942. The Appeal Court judge, so far as the note goes, made no inquiry with regard to the absence of Mr. Manilal or as to the date when he might be expected to arrive, but proceeded with the case. He heard some very short statements by the appellants and dismissed the appeals. In these circumstances it is contended on behalf of the appellants that there was a disregard of s. 3, sub-s. 2, of the Poor Persons Defence Ordinance and that the appeal has, accordingly, not been heard in accordance with the provisions applicable in the protectorate and must be treated as not having taken place, with the result that there was nothing which the acting secretary to the government could validly confirm so far as the sentence of death was concerned.

It seems to their Lordships that the provisions as regards the right of a convicted person are not of a merely directory character. Sub-section 2 provides that poor persons in the position of the appellants, having been convicted at the trial, are entitled as of right, on lodging an appeal, to have an advocate assigned to them for the preparation and also for the conduct of such appeal. In the case of Somali natives, who would probably be illiterate, and, therefore, completely unable to make any criticism on the written judgment of the trial judge, even if they could read it, it is clear that the provision is of the utmost importance where the penalty is the death sentence. There does not seem to be any reason for a very technical construction to be given to the sub-section in question. The necessity for an assignment of counsel for the purpose of "conducting an appeal" seems to their Lordships to involve the necessity of seeing that it will be possible for the counsel to be present at the hearing. An appreciation was called for of the difficulties which, in such a case as their Lordships have before them, might well make it impossible for counsel to cross 150 miles of sea by an adequate ship in time to be present on the date originally fixed for the hearing of the appeal. The assignment of counsel in the present case was made of no effect. These considerations seem not to have been present to the mind of the judge sitting as the Appeal Court, and, in the view of their Lordships, the provisions of s. 3 of the Poor Persons Defence Ordinance, so far as regards the appeal, have, as a matter of substance, been disregarded. They will add that there does not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable Mr. Manilal to attend, and their Lordships are informed that he, in fact, arrived in British Somaliland on July 2, 1942, so that a comparatively short adjournment would have enabled him to attend and to argue the case on appeal.

The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel: see Holdsworth, History of English Law, vol. IX. p. 226 et seq. This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so, it seems to their Lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the government who was unable, without any default on his part, to reach the court in time to conduct the appeal. The result is that the appeal to the Protectorate Court of Appeal, which appears to have been properly lodged, has not been effectively heard. The present appeal must, therefore, be allowed. Steps must be taken to restore the appeal for hearing, either with Mr. Manilal or some other advocate properly assigned to the appellants, in circumstances which will enable him to conduct the appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Hy. S. L. Polak & Co.*
Solicitors for respondent: *Burchells.*

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ADEL MUHAMMED EL DABBAH . . APPELLANT;
AND
ATTORNEY-GENERAL FOR PALESTINE RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Criminal law—Murder—Constitution of Criminal Assize Court—Statutory regulation—Witnesses named on information—Tender for cross-examination by defence—Discretion of prosecutor—Emergency Powers (Defence) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-ss.* 1, 3, 4—*Palestine Defence (Judicial) Regulations (No.* 2), 1942, *reg.* 3.

Regulation 3 of the Palestine Defence (Judicial) Regulations (No. 2), 1942, made by the High Commissioner for Palestine, which provides that the Chief Justice "may, either generally "or for the hearing of any particular case, direct that the Court "of Criminal Assize shall consist of the Chief Justice . . . . sitting "alone . . . .," is intra vires the powers given to the High Commissioner by the Emergency Powers (Defence) Act, 1939, as applied to Palestine by the Emergency Powers (Colonial Defence) Order in Council, 1939. The discretion conferred on the Chief Justice by the regulation involves no delegation of the High Commissioner's powers, but is an executive discretion necessary to the carrying out of the High Commissioner's conclusions as expressed by the regulation. Accordingly, a Court of Criminal Assize to try the appellant on a charge of murder consisting, by virtue of the regulation, of the Chief Justice sitting alone, was validly constituted, and the regulation, which is inconsistent with the Courts Ordinance, 1940, under which the appellant would have had a right to a court of three judges, must prevail by virtue of sub-s. 4 of s. 1 of the Emergency Powers (Defence) Act, 1939.

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* *Present:* VISCOUNT MAUGHAM, LORD THANKERTON and SIR MADHAVAN NAIR.

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Further, the prescribing in the cause list of the Supreme Court of Palestine (which was approved by the Chief Justice) of the constitution of the court which was to try the appellant was a proper direction under reg. 3 by the Chief Justice in the exercise by him of the discretion vested in him by the regulation. This direction was not a "regulation or order" within s. 7 of the Interpretation Ordinance, 1933, and, therefore, there was no need to publish it in the *Gazette*.

The prosecution in a criminal case has a discretion as to what witnesses they shall call. It is consistent with that discretion that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender for cross-examination by the defence witnesses whose names are on the back of the information but who have not been called to give evidence for the prosecution, but it remains a matter for the discretion of the prosecutor.

Interlocutory observation of Lord Hewart C.J. in *Rex* v. *Harris* [1927] 2 K. B. 587, 590, that "in criminal cases the prosecution "is bound to call all the material witnesses before the court," held not to have been intended to negative the right of the prosecutor to exercise his discretion to determine the material witnesses.

Judgment of the Supreme Court of Palestine, sitting as a Court of Criminal Appeal, affirmed.

APPEAL (No. 66 of 1943), by special leave, from a judgment of the Supreme Court of Palestine (Copland, Rose and Khayat JJ.), sitting as a Court of Criminal Appeal (April 17, 1943), dismissing an appeal by the appellant from a judgment of the Court of Criminal Assize at Haifa (Gordon Smith C.J.) (March 24, 1943), whereby the appellant was convicted of murder contrary to s. 214 (*b*) of the Criminal Code Ordinance, 1936, and was sentenced to death.

The case for the prosecution was that on the evening of May 7, 1942, the murdered man, Ya'Coub Nimer el Khazen, who was a prominent member of the village community of Binah, had been attending a conference at the Mukhtar's house. After the meeting he and others left to return to their houses in or near the village. They dropped off one by one, leaving the deceased to finish the end of his journey alone. Shortly afterwards, as he was nearing his own house, shots were heard, and immediately afterwards he was found lying dead within a few metres of the doorway to the courtyard of his house. On examination he was found to have received two bullet wounds from which he appeared to have died instantaneously. At or about the time of the shooting three men carrying rifles were seen in the vicinity. Five persons

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who gave evidence identified the appellant as one of the three men, some of them stating that they had seen him, as also the other two men, fire their rifles in the direction of the deceased's house. The appellant's defence was that he was not present at Binah at the time of the shooting, and he called witnesses to establish an alibi on his behalf. The Chief Justice sat alone to try the case by virtue of reg. 3 of the Palestine Defence (Judicial) Regulations (No. 2), 1942, which were made by the High Commissioner under art. 3 of the Emergency Powers (Colonial Defence) Order in Council, 1939, and the Emergency Powers (Defence) Act, 1939, and the main question in this appeal was whether the regulations were intra vires the powers of the High Commissioner so that the Court of Criminal Assize was validly constituted under the provisions of reg. 3 thereof.

By reg. 3 of the Palestine Defence (Judicial) Regulations (No. 2), 1942: "Whenever the Chief Justice considers it "expedient so to do he may, either generally or for the hearing "of any particular case, direct that the Court of Criminal "Assize shall consist of the Chief Justice or a British puisne "judge, sitting alone, or with any one or more judge or judges "of the Supreme Court, or with a president, or relieving "president, or any one or more Palestinian judge or judges, "of the District Court."

By the Emergency Powers (Defence) Act, 1939, s. 1: "(1.) Subject to the provisions of this section, His Majesty "may by Order in Council make such regulations (in this "Act referred to as 'Defence Regulations') as appear to "him to be necessary or expedient for securing the public "safety, the defence of the realm, the maintenance of public "order and the efficient prosecution of any war in which His "Majesty may be engaged, and for maintaining supplies and "services essential to the life of the community . . . . "(3.) Defence Regulations may provide for empowering such "authorities, persons or classes of persons as may be specified "in the regulations to make orders, rules and byelaws for "any of the purposes for which such regulations are authorized "by this Act to be made, and may contain such incidental "and supplementary provisions as appear to His Majesty in "Council to be necessary or expedient for the purposes of the "regulations. (4.) A Defence Regulation, and any order, rule "or byelaw duly made in pursuance of such a regulation, shall "have effect notwithstanding anything inconsistent therewith "contained in any enactment other than this Act or in any "instrument having effect by virtue of any enactment other "than this Act."

1944. April 19, 20. *Beyfus K.C.* and *Bassett* for the appellant. The Defence (Judicial) Regulations, reg. 3, is ultra vires the powers given to the High Commissioner by the Emergency Powers (Defence) Act, 1939, as applied to Palestine by the Emergency Powers (Colonial Defence) Order in Council, 1939. Regulation 3 purports to take away an accused person's right, as given by the Courts Ordinance, 1940, to be tried by not less than three judges, and puts the matter in the discretion of the Chief Justice. The ordinary and normal constitution of the courts in Palestine as prescribed by ordinance cannot be so altered. Clear and unambiguous provision is required before the lawful constitution of the court can be altered by means of regulation. The power of the High Commissioner to make regulations is contained in s. 1 of the Emergency Powers (Defence) Act, 1939, and is strictly limited thereto. A regulation which purports to delegate to the Chief Justice, not the right to make orders, rules and byelaws generally, which would appear to be specifically authorized by sub-s. 3 of s. 1 of the Act of 1939, but the right in any particular case to decide whether the ordinary constitution of the Palestine courts shall be upset, is ultra vires. The regulation is also ultra vires because it involves a delegation of the powers of the High Commissioner not authorized by sub-s. 3. Further, it is specifically provided in the Defence (Judicial) Regulations, 1942, that the Palestine Interpretation Ordinance, 1933, shall apply to them, and it follows from that, if the matter should be held to fall within sub-s. 3 of s. 1 of the Act of 1939, that inasmuch as the regulation in question "confers power . . . . to make . . . . "orders . . . ." within the meaning of s. 7 of the Interpretation Ordinance, then any such order should have been published in the *Gazette* under s. 7 (*d*) of the ordinance. There was no such order by the Chief Justice published in the *Gazette*, and, it is submitted, no order or direction was ever, in fact, made by the Chief Justice. What is relied on as a direction is the cause list which gave the constitution of the court, approved by the Chief Justice. The Chief Registrar did not certify that any such direction was given by the Chief Justice. The matters complained of with regard to the propriety of the trial are cumulative: (*a*) Those involved in a change of the oral judgment as subsequently corrected, which, to a considerable extent, were corrections of typist's errors; (*b*) the Chief Justice failed to direct his mind to the question of premeditation; and (*c*) the prosecution refused to call certain witnesses or to tender them for cross-examination. As to (*b*) (supra), premeditation is not premeditation in the ordinary normal English sense. [Reference was made to ss. 212, 214 and 216 of the Criminal Code Ordinance.] In Palestine every element of murder, including premeditation as defined in the ordinance, has to be proved with legal certainty. There was here no such certain evidence as is necessary in a criminal case that the appellant ever killed the deceased or that he had previously resolved to do so. There was no evidence of any enmity between them. Secondly, the Chief Justice never directed his mind to the question of premeditation and the definition of it. With regard to (*c*), the calling of witnesses by the prosecution, see Archbold's Criminal Law, 31st ed., p. 470, and the interlocutory observation of Lord Hewart C.J. in *Rex* v. *Harris* (1) where he said: "In criminal cases the prosecution is bound "to call all the material witnesses before the court, even "though they give inconsistent accounts, in order that the "whole of the facts may be before the jury." If that be right, it was clearly violated by the prosecution in this case when they refused to call, or to tender for cross-examination, two witnesses whom they described in their own case as having been called before the examining magistrate on the issue of enmity. The law is stated in Halsbury's Laws of England, 2nd ed., vol. ix., para. 232, p. 164. The authorities on tendering witnesses are nearly all between 90 and 100 years ago, and are about equally divided in favour of and against the appellant here: *Rex* v. *Simmonds* (2); *Reg.* v. *Woodhead* (3); *Reg.* v. *Cassidy* (4); *Reg.* v. *Edwards* (5); *Reg.* v. *Thompson* (6); *Reg.* v. *Bodle* (7); *Reg.* v. *Barley* (8); and *Rex* v. *Beezley* (9). All the witnesses on the back of the information should be called by the prosecution unless there are exceptional reasons to the contrary, so that the accused may have an opportunity of examining them.

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(1) [1927] 2 K. B. 587, 590.
(2) (1823) 1 C. & P. 84.
(3) (1847) 2 C. & K. 520.
(4) (1858) 1 F. & F. 79.
(5) (1848) 3 Cox. C. C. 82.
(6) (1876) 13 Cox C. C. 181.
(7) (1833) 6 C. & P. 186.
(8) (1847) 2 Cox C. C. 191.
(9) (1830) 4 C. & P. 220.

Bassett followed.

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Sir David Maxwell Fyfe S.-G. and *Preedy* for the respondent. The discretion given to the Chief Justice was conferred by the regulation. It is the provision for such a discretion which alters the appellant's right. His right under the Courts Ordinance of 1940 was already qualified before the Chief Justice ever exercised his discretion. The exercise of the discretion is a quasi-judicial or administrative act and not a piece of subsidiary legislation. The making of the direction by signing the cause list, again, is an executive act, and, so long as it is within reason and does not contravene justice, this would not be a point which would go to the root of a case of this kind. When the cause list is signed, it can be seen in the ordinary way. As to the calling of witnesses, the practice is for counsel for the prosecution to try to accede to the wishes of the defence if possible, but the right and duty of counsel for the prosecution to make his own decision as to what witnesses he should call appear never to have been questioned. If he has relevant witnesses, and no reason to doubt their good faith, he should put them in the witness box even if they turn out against his case. On the other hand, he must have a clear and unfettered discretion as to which witnesses he will call. The position of counsel for the prosecution in that respect should not be undermined in any way.

Beyfus K.C., in reply. To alter the courts as constituted by the law cannot be an executive act. It is a delegation of powers.

May 18. The judgment of their Lordships was delivered by LORD THANKERTON. On March 24, 1943, the Chief Justice of Palestine, sitting alone as the Court of Criminal Assize at Haifa, convicted the appellant of murder contrary to s. 214 (*b*) of the Criminal Code Ordinance, 1936, and sentenced him to death. An appeal by the appellant was dismissed on April 17, 1943, by the Supreme Court of Palestine, sitting as the Court of Criminal Appeal, and the appellant, by special leave, now appeals against that judgment. Mr. Beyfus, in his full and able argument on behalf of the appellant, conveniently submitted his contentions under two heads, namely, those which challenged the constitution of the Court of Criminal Assize by which the appellant was tried, and those which alleged grave impropriety in the course of the trial.

As regards the constitution of the trial court, the Chief

Justice sat alone by virtue of reg. 3 of the Palestine Defence (Judicial) Regulations (No. 2), 1942. [His Lordship read the regulation.] At the date of making these regulations, the constitution of the Court of Criminal Assize was prescribed by s. 10 of the Courts Ordinance, 1940 (No. 31 of 1940), under which, in the absence of any application by the accused, such court must consist of three judges. No such application was made by the present appellant. Mr. Beyfus submitted that the Court of Criminal Assize was not validly constituted on three grounds, namely, (*a*) that reg. 3, which was made by the High Commissioner under the powers vested in him by art. 3 of the Emergency Powers (Colonial Defence) Order in Council, 1939, and the Emergency Powers (Defence) Act, 1939, was not within the powers thus vested in him, and was, therefore, ultra vires of the High Commissioner; (*b*) that, assuming that reg. 3 was intra vires of the High Commissioner, any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case; and (*c*) that, in any event, such a direction was an order within the meaning of s. 7 of the Palestine Interpretation Ordinance, 1933 (No. 69 of 1933), which was applied to the Defence (Judicial) Regulations, 1942, by reg. 9 thereof, and which required publication in the *Gazette* before such an order could have the force of law. These submissions were raised for the first time before this Board.

(*a*) It is unnecessary to refer to the Order in Council of 1939 in detail. It is sufficient to state that its effect was to extend the Emergency Powers (Defence) Act, 1939, to Palestine, and, for present purposes, that the parts of s. 1 of the Act which are material may be read as originally enacted with the substitution of the High Commissioner for His Majesty in Council. [His Lordship read s. 1, sub-ss. 1, 3 and 4 of the Act, and continued:] Counsel for the appellant maintained that the discretion conferred on the Chief Justice by reg. 3 involved a delegation of his powers by the High Commissioner which was not authorized by sub-s. 3 of s. 1 of the Act of 1939, which only authorized a delegation in general terms of the High Commissioner's power to make regulations under sub-ss. 1 and 2 of s. 1, and that, therefore, the attempted delegation in reg. 3 was ultra vires of the High Commissioner. Counsel also maintained that the right conferred on an accused person to be tried by a court of three judges by the Courts Ordinance of 1940 could not be modified or abrogated by any such regulation made by the High Commissioner, and that, in any event, the intention to modify or abrogate such a right must be made clear beyond any doubt in the regulations. Their Lordships are unable to accept any of these contentions. In their opinion, it is clear that the High Commissioner satisfied himself that these regulations were necessary or expedient for the purposes stated in sub-s. 1 of s. 1 of the Act of 1939, and, inter alia, that a flexibility in the constitution of the courts of criminal assize was necessary or expedient. It was rightly admitted by counsel for the appellant that he was not able to challenge the validity of the High Commissioner's conclusions. Their Lordships are of opinion that the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers, but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions. Accordingly, no question can arise under sub-s. 3 of s. 1 of the Act. As regards the other contentions, as to modification or abrogation of the appellant's right to a court of three under the Courts Ordinance of 1940, reg. 3 of 1942 is clearly inconsistent with it, and, by virtue of sub-s. 4 of s. 1 of the Act, the regulation must prevail. The suggestion made by counsel that the appellant's right was not modified or affected until the Chief Justice exercised his discretion is fallacious. It was modified by the regulation as soon as it came into operation.

(*b*) Reg. 3 of 1942 makes no provision for the form which the direction by the Chief Justice is to take. In the present case the constitution of the court which was to try the appellant was prescribed in the Cause List of the Supreme Court of Palestine for the week ending Saturday, March 20, 1943, which had been approved by the Chief Justice before Monday, March 15, 1943. Their Lordships can see no ground for suggesting that this course for fixing the constitution of the court which was to try the appellant, which is obviously the usual method of administering the business of the court, was not a proper method by which the Chief Justice should exercise the discretion vested in him.

(*c*) Section 7 of the Interpretation Ordinance, 1933, so far as material, provides as follows:—" 7. Where an ordinance " confers power on any authority to make regulations or " orders, the following provisions shall have effect with " reference to the making and operation of such regulations " or orders . . . ." (*d*) all regulations and orders, save "where otherwise provided, shall be published in the *Gazette*, "and shall have the force of law upon such publication thereof "or from the date named therein." It follows from the views already expressed by their Lordships that the direction by the Chief Justice under reg. 3 of 1942 is not a regulation or order within the meaning of the above section, and that there was no need to publish it in the *Gazette*.

Their Lordships now turn to the second group of contentions raised on behalf of the appellant, which relate to the course of the trial, and are as follows:—(*a*) That the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him; (*b*) that there was no sufficient evidence before the Chief Justice to justify a finding of "premeditation" within the meaning of ss. 214 and 216 of the Palestine Criminal Code Ordinance, 1936, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon; and (*c*) that the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was any obligation on the Crown to tender for cross-examination by the defence witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial.

(*a*) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on April 17, 1943, which the learned judge now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point as the only change from the judgment as orally delivered which the appellant founds on, is admitted by the learned judge in his statement, namely, the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was, in fact, not given at the trial, but was contained in his deposition at the preliminary inquiries, which mention was omitted in the judgment finally issued. This point was raised before the

Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity, not only between the villages, but also between the families of the deceased and the appellant, and that this alteration in the judgment cannot be regarded as a substantial one which would affect the conclusions arrived at by the learned judge.

(*b*) The appellant was charged under s. 214 (*b*) of the Criminal Code Ordinance as having " with premeditation " caused the death of the deceased, and s. 216 provides as follows :—" 216. For the purpose of s. 214 of this Code a person is " deemed to have killed another person with premeditation " when—(*a*) he has resolved to kill such person or to kill any " member of the family or of the race to which such person " belongs, provided that it shall not be necessary to show that " he resolved to kill any particular member of such family " or race, and (*b*) he has killed such person in cold blood " without immediate provocation in circumstances in which " he was able to think and realise the result of his actions, and " (*c*) he has killed such person after having prepared himself " to kill such person or any member of the family or race to " which such person belongs, or after having prepared the " instrument, if any, with which such person was killed. " In order to prove premeditation it shall not be necessary to " show that an accused person was in any state of mind for " any particular period or within any particular period before " the actual commission of the crime, or that the instrument, " if any, with which the crime was committed was prepared " at any particular time before the actual commission of the " crime." Under this section the three essential ingredients are cumulative, and while Mr. Beyfus admitted that there was sufficient evidence to justify a finding under (*b*) and (*c*), he submitted that there was no sufficient evidence to justify a finding under (*a*), and that, subject to his next contention, the learned judge misdirected himself, and the conviction under s. 214 could not be supported. It will seldom be found that there is direct evidence of a resolution to kill. Such a resolution will more often rest on legitimate inferences from the proved circumstances, and the conduct of the accused, and, in the opinion of their Lordships, the circumstances proved in the present case and the conduct of the accused, along with the two others who accompanied him, but whose identity has not been proved, afford ample ground for a finding that the appellant resolved to kill the deceased. The Court of Criminal Appeal, holding, in effect, that the Chief Justice had pronounced no finding as to premeditation, and forming an independent view of their own on the evidence, stated, "it is "quite clear to our minds that the irresistible inference—the "only inference possible from the facts of this case—is that "this killing was done with premeditation." While not accepting their criticism on the judgment of the Chief Justice, their Lordships are unable to come to any different conclusion on the facts, which are summarized by the Court of Criminal Appeal as follows: "That the three armed men were seen "proceeding from north to south at varying distances up to "a maximum of a hundred metres from the house of the "deceased; that shots were fired by those armed men into "the doorway of the house of the deceased; that the deceased "was found lying eighteen metres from his doorway with "two shots in the back; that the three armed men were seen "immediately after the shots had been heard proceeding "together from south to north over the road by which they "had approached the scene; that there is no evidence and "no suggestion that there was any provocation or quarrel; "and that it was night time." On the question of common design, they state: "Three men armed going to the scene "of the crime, all returning from the scene together, all "three actually shooting into the doorway of the house of "the man who was eventually killed, two cartridges found "showing that two shots had been fired two and a half and "four metres from the place where the body of the deceased "was found. From these facts it seems to this court that "common design is proved beyond a shadow of a doubt, and "that no other conclusion is possible." It is also well to bear in mind the conclusions of the Court of Criminal Appeal as to proof of enmity between the appellant and the deceased and between their families which have been already referred to. This evidence of enmity was also treated by the learned Chief Justice as relevant to the question of premeditation. It may be added that the appellant himself admitted that there were broken relations between the deceased and himself. The appellant's counsel submitted that, in any event, the Chief Justice had neither considered, nor made any finding on, premeditation, and the Court of Criminal Appeal would appear to have accepted this criticism to some extent. In their

Lordships' opinion, the learned judges did not pay sufficient attention to the clear and express language of the Chief Justice. The form of his judgment was provided for by s. 51 of the Criminal Procedure (Trial upon Information) Ordinance, 1933, which provides :—" 51. Upon the conviction of any person " for any offence the presiding judge shall, upon his notes " of the proceedings, record the findings of fact on which the " conviction is based : Provided that no conviction shall be " invalid for failure to include in such record a finding of " a fact if such fact shall appear to be sufficiently established " by the evidence given in the case." It is only necessary to make a short quotation from the judgment of the learned Chief Justice : " It is not necessary for the prosecution to " prove a motive for a murder, but it does explain what " otherwise might be unexplainable. In this case it explains " the shooting in cold blood of the deceased, and it was a " premeditated murder. I, therefore, find that Adel, accused " No. 1, was one of the three men who took part in this " murder, and I, therefore, find him Guilty of murder as " charged. . . . Adel Muhammed el Dabbah, as I said a few " moments ago, this is a cold-blooded premeditated murder, " of which I find you Guilty." The Court of Criminal Appeal does not pay attention to these findings as to premeditation which expressly formed part of the charge, and one could not easily assume—even apart from his express reference thereto—that the learned Chief Justice had not considered this outstanding element in the law of murder in Palestine.

(*c*) The last contention of the appellant is that he had a right to have the witnesses, whose names were on the information but who were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence at the close of the case for the prosecution. The learned Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses and that they could not say that the learned Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be tendered at the close of the case for the prosecution so that the defence may cross-examine them if they wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all courts. While their Lordships agree that there was no obligation on the prosecution to tender these witnesses, and, therefore, this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognizes that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. No such suggestion is made in the present case. It will be sufficient to go back to the judgment of Alderson B. in *Reg.* v. *Woodhead* (1), in which he said, " You are aware, I presume, of the rule which the " judges have lately laid down, that a prosecutor is not bound " to call witnesses merely because their names are on the back " of the indictment. The witnesses, however, should be here, " because the prisoner might otherwise be misled ; he might, " from their names being on the bill, have relied on your " bringing them here, and have neglected to bring them " himself. You ought, therefore, to have them in court, " but they are to be called by the party who wants their " evidence. This is the only sensible rule." In reply to the counsel for the prisoner, who asked if he was to understand that if he called them he would make them his own witnesses, Alderson B. said, " Yes, certainly. That is the proper course, " and one which is consistent with other rules of practice. " For instance, if they were called by the prosecutor, it might " be contended that he ought not to give evidence to show " them unworthy of credit, however falsely the witnesses " might have deposed." In a later case, *Reg.* v. *Cassidy* (2), Parke B., stated the correct principle to be " that the counsel " for the prosecution should call what witnesses he thought " proper, and that, by having had certain witnesses examined " before the grand jury whose names were on the back of the " indictment, he only impliedly undertook to have them in " court for the prisoner to examine them as his witnesses ; for " the prisoner, on seeing the names there, might have abstained " from subpœnaing them. He would, therefore, follow the " course said to have been pursued by Campbell C.J., ... " who ruled that the prosecutor was not *bound* to call such " a witness, and that if the prisoner did so, the witness should " be considered as his own." Cresswell J., who was consulted

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(1) 2 C. & K. 520.

(2) 1 F. & F. 79.

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by Parke B., agreed with this view. It is consistent with the discretion of counsel for the prosecutor, which is thus recognized, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence, and this practice has probably become even more general in recent years, and rightly so, but it remains a matter for the discretion of the prosecutor. Archbold, 31st ed., 1943, contains a list of a series of decisions, but in none of these has the court superseded the prosecutor's discretion. The most recent of these was an unreported case of *Rex* v. *Nicholson*, at the Nottingham Assizes in 1937, where Hawke J. declined to force the prosecution to call a witness whom they regarded as unnecessary. Reference should also be made to an interlocutory remark by Lord Hewart C.J. in *Rex.* v. *Harris* (1), to the effect that " in criminal cases the prosecution is bound " to call all the material witnesses before the court, even " though they give inconsistent accounts, in order that the " whole of the facts may be before the jury." In their Lordships' view, the learned chief justice could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are. It may be noted that under s. 41 of the Criminal Procedure (Trial upon Information) Ordinance, 1933, already referred to, the court has the right, of its own motion, to call on persons to give evidence. This last contention of the appellant, therefore, also fails, and, on the whole matter, their Lordships are of opinion that the appeal should be dismissed, and the judgment of the Court of Criminal Appeal should be affirmed, and their Lordships will advise His Majesty accordingly.

Solicitors for appellant: *Piper, Smith & Piper.*
Solicitors for respondent: *Burchells.*

(1) [1927] 2 K. B. 587, 590.

J. C.*

1944

June 12.

OKE LANIPEKUN LAOYE AND OTHERS . APPELLANTS;

AND

AMAO OYETUNDE. . . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Nigeria—Native chief—Appointment—Native law and custom—Jurisdiction—Overriding legislation—Applicable to a head chief only—Appointment and Deposition of Chiefs Ordinance, No. 14 *of* 1930, *s.* 2, *sub-s.* 2.

Sub-section 2 of s. 2 of the Appointment and Deposition of Chiefs Ordinance, 1930, which provides that " The governor shall " be the sole judge as to whether any appointment of a chief or " head chief, as the case may be, has been made in accordance " with native law and custom," applies to the appointment of chiefs in the colony (of Lagos) and head chiefs in the protectorate of Nigeria, and, accordingly, has no application to the office of a chief in the protectorate who is not a head chief therein, and the sub-section cannot oust the jurisdiction of the court to determine whether his appointment was made in accordance with native law and custom.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 28 of 1942) from a judgment of the West African Court of Appeal (November 8, 1941), dismissing an appeal by the appellants against a judgment of the High Court of the Ibadan Judicial Division in the protectorate of Nigeria (April 28, 1941).

The main question in this appeal was whether the trial court had jurisdiction to try the issue whether the respondent had been appointed bale (chief) of Ogbomosho in accordance with native law and custom. The following facts are taken from the judgment of the Judicial Committee. Ogbomosho was a town in the protectorate of Nigeria, in the province of Oyo. Its native authority consisted of a head called the bale and a council which was subordinated to the olubadan and council of Ibadan, the native authority appointed for the Ibadan division in which Ogbomosho was situate. The bale of Ogbomosho by native law and custom was entitled to the use and occupation of a property in the town known as Sohun. That property contained shrines, furniture and paraphernalia which it was part of the bale's duty to keep up so that the separation of the property from the office would be intolerable under native law and custom. The appellants, who were plaintiffs in the action as representing their several families, claimed that the respondent was illegally in possession of the Sohun which he held on the footing that he was the bale whereas he had not been elected in accordance with the relevant law and custom. The four families which the appellants represented, together with a further family, that of Ajibola, were, it was alleged, entitled to elect the bale according to the custom. That custom, so the appellants objected, had not been followed in the appointment of the respondent, which was thus invalid. The appellants, accordingly, claimed possession of the Sohun. The custom alleged and proved by the appellants, was that when the office of bale became vacant the five families in turn were entitled to fill the vacant office, their eldest member, and if he was unfit, their next eldest member, being appointed to the office. The difficulty which led to the trouble was that on the previous vacancy Oyekola, of the family of Laoye, which was the family whose turn it was, would have become bale, but he died before going to Ibadan for the approval of his succession by the olubadan and council of Ibadan. He thus died before his installation and never became bale. The contest which arose was whether the vacancy should be filled by his son, the respondent, or by his brother, Oke Laniperkun Laoye, who was the next eldest fit member of the same family. It was not disputed that the appointment remained in the family since it was the family's turn to appoint. The appellants alleged as a further ground of their claim that according to custom no one could be a bale whose father had not been a bale. Another element of the custom which was spoken to in the evidence was that the member of the family entitled to the right of selecting the bale must have at least the general consent of the responsible members of the family. The trial judge (C. G. Ames, Assistant Judge) held that the respondent was not chosen to succeed to the bale in accordance with native law and custom, but for reasons which the West African Court of Appeal said did not apply (see the judgment of the Judicial Committee) he dismissed the action. On appeal, the Court of Appeal (Baker, Brooke and Jeffreys JJ.) held that the trial court had no jurisdiction to try the action, being of opinion that by reason of sub-s. 2 of s. 2 of the

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* *Present:* LORD THANKERTON, LORD WRIGHT and SIR MADHAVAN NAIR.

J. C.

1944

Oke Lanipekun Laoye v. Amao Oyetunde.

Appointment and Deposition of Chiefs Ordinance, 1930, the governor was the sole judge to determine the question of native law.

1944. May 4. *Horace Douglas K.C.* and *Bernstein* for the appellants. Under native law and custom no person may be appointed the bale who is not the son of a bale, and the respondent is the son of a person who was never a bale. Two cases are known of a bale elect having died before actual installation. Each of them had sons, and in each case a brother, and not a son, eventually became the bale. The trial court had jurisdiction to entertain the action. On construction, the Appointment and Deposition of Chiefs Ordinance, 1930, gives the governor power, by s. 2, sub-s. 2, to decide whether a chief in the colony of Lagos or a head chief in the protectorate of Nigeria has been appointed in accordance with native law and custom, but he has no power thereunder in respect of a chief who is not a head chief in the protectorate. The respondent is not a head chief, his office being subordinate to the olubadan and council of Ibadan: see the Interpretation Ordinance, No. 27 of 1939, which enacts that "'chief' or 'native chief' means any native whose authority "and control are recognized by a native community, and "'head chief' means any chief who is not subordinate to any "other chief or native authority." The respondent was not properly appointed according to native law and custom, and is wrongfully in possession of the Sohun. [Reference was made to *E. U. Essen* v. *Ntuen Ibok Ediok* (1).]

Bernstein followed.

The respondent did not appear.

June 12. The judgment of their Lordships was delivered by Lord Wright, who stated the facts and continued: This appeal raises an important question as to the customary and statutory law relating to the election of chiefs in the protectorate of Nigeria. The policy of the British government in this, and in other, respects is to use for purposes of the administration of the country the native laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The courts which have been established by the British government have the duty of enforcing these native laws and customs, so far as they are not barbarous, as part of the law of the land. In particular, native laws and customs regulating the appointment and election of chiefs have been recognized as having the force of law. This was pointed out in the judgment of this Board in *Eshugbayi Eleko* v. *Nigerian Government* (1). In this way the dispute which had arisen as to the successor to the chieftainship of the town or district of Ogbomosho was brought for adjudication to the High Court of the Ibadan Judicial Division of the protectorate of Nigeria to which it had been transferred from the Native Court of Oke Are Land Court, and, on appeal from the High Court, to the West African Court of Appeal held at Lagos, Nigeria.

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(1) (1936) 13 Nig. L. R. 99.

It is important to observe both that Ogbomosho is in the protectorate of Nigeria and not in the colony of Lagos, and that the bale of Ogbomosho though a chief is not a head chief, within the definition of the Interpretation Ordinance, 1939, Laws of Nigeria, No. 27, which apply to this case. The material definitions are :—" 'Chief or Native Chief' means " any native whose authority and control are recognized by " a native community, and 'Head Chief' means any chief " who is not subordinate to any other chief or native authority," and " 'Native authority' means a native authority con- " stituted under any ordinance authorizing the constitution of " native authorities." These definitions apply in the facts of the present case. The subordination of the native authorities of Ogbomosho to those of Ibadan is for purposes of administration, and does not affect the rules as to the appointment of the bale of Ogbomosho which are regulated by the custom applying to it. What this custom is was the subject of elaborate evidence at the trial before the judge of the Ibadan Division. His finding on this matter was not questioned in the Court of Appeal, but it was treated as irrelevant on the ground that it had been superseded in its operation by Nigerian ordinances.

[Having referred to the facts his Lordship continued :] The trial judge accepted the evidence called by the appellants and held that the custom which they alleged was proved. He summed up his conclusion as follows: " The result of my " consideration of the evidence about the relevant native " law and custom is that, if I thought the case had to be " decided according to whether or not I find that the appoint- " ment of the defendant as bale accorded in all respects with

(1) [1931] A. C. 662, 673.

"the relevant traditional law and custom, my finding would "be that it did not so accord, and I should give judgment in "favour of the plaintiffs. I do not think that the case so "falls to be decided. There are other relevant factors as "it seems to me." His view, which he goes on to explain, is in effect that the traditional law and custom in regard to this matter had been altered by the legislation, contained in the Native Authorities Ordinance, 1933. In virtue of that ordinance, the baleship of Ogbomosho had become, in his opinion, "a cog in the machinery of government and "administration," all native authorities being charged with the obligation to maintain order and good government. From this he seems to have deduced that the law and custom regulating the mode of appointing a bale has been changed, and that, as there was a difference of opinion in the council whether the first appellant in his personal capacity or the respondent should become bale, this difference was properly put before the Olubadan and his council at Ibadan. These authorities having made a recommendation in favour of the respondent, which was approved by the Resident, the judge held that the respondent was in due course installed as bale and entered into possession of the compound. The judge also relied on General Order (*e*), which he held delegated to Chief Commissioners and Residents the executive power to approve appointments and dismissals of staff under the native administration with exceptions not here relevant. This order, he held, justified a letter from the Chief Commissioner approving the Resident's recognition of the respondent's appointment.

Their Lordships are of opinion that the ordinance and general orders on which the judge relies furnish no ground for overruling the traditional law and custom in the matter. They agree in this respect with the decision of the Court of Appeal, who point out that the Native Authorities Ordinance "gives "supplementary powers to a bale, but has nothing to do with "the actual appointment." On this ground the Court of Appeal rightly, in their Lordships' opinion, held that the ordinance and the general orders did not change the native law and custom here in question. The court, moreover, while they quote, with apparent approval, the finding of the trial judge as to the native law and custom, proceed to dismiss the appellants' claim on a different statutory ground which they find in Ordinance No. 14 of the Laws of Nigeria of 1930.

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The title of this is " An Ordinance to provide for the appointment and deposition of Chiefs in the Colony (sc. Lagos) " and Head Chiefs in the Protectorate." The court base their decision on s. 2, sub-s. 2, of the ordinance, which is in the following terms :—" (2.) The governor shall be the sole judge " as to whether any appointment of a chief or head chief, as " the case may be, has been made in accordance with native " law and custom." Those words, the court holds, oust the jurisdiction of the court and make conclusive the recognition by the governor of the respondent as bale.

Their Lordships are unable to agree with this decision. It is true that s. 2, sub-s. 2, does not contain the words " Chief " of the colony " or " head chief in the protectorate," but these qualifications are clearly imported if the ordinance is read as a whole. The title, which I have quoted, forms part of the enacting statute and may be considered in determining the scope of the enactment. This is now settled law for which, if authority is needed, reference may be made to the clear statement of Lindley M.R. in *Fielden* v. *Morley Corporation* (1). It is true that the title, much in the same way as the preamble, cannot be taken to override any clear and specific provision in the body of the statute. The statute must be read as a whole. There is, however, in the ordinance now being considered, nothing to extend the particular scope defined in the title. Sect. 2, sub-s. 1, uses the full phrases " chief in the " colony " : " head chief in the protectorate." The curtailed language of sub-s. 2, which is merely ancillary to sub-s. 1, is, in their Lordships' opinion, not to be taken to refer to anything other than what is specified in sub-s. 1, or to go beyond the scope of the title. It follows from this construction that since the bale of Ogbomosho is, according to the definition quoted above, not a head chief, being subordinate to Ibadan, and is not a chief in the colony of Lagos but in the protectorate of Nigeria, sub-s. 2 has no application to his office. This ordinance, therefore, cannot any more than the legislation relied on by the trial judge, serve to override or qualify the relevant law or custom, which both courts on evidence which their Lordships regard as conclusive, have accepted as established. In the result, their Lordships are of opinion that the appeal should be allowed and the judgment appealed from should be set aside, and that it should be declared that the possession of the Sohun by the respondent is illegal, and that

(1) [1899] 1 Ch. 1.

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the first appellant is entitled to be appointed bale and to be given possession of the Sohun with its furniture and paraphernalia, and that the case should be remitted to the court in Nigeria to do what is necessary to carry out these declarations. The respondent will pay the appellants' costs of the appeal and in the courts below. They will humbly so advise His Majesty.

Solicitors for appellants: *Rexworthy, Bonser & Wadkin.*

[PRIVY COUNCIL].

J. C.*
1944
May 18.

BANK OF BARODA, LIMITED . . APPELLANTS;

AND

PUNJAB NATIONAL BANK, LIMITED AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF CALCUTTA.

India—Banker—Post-dated cheque—"Marked good for Payment" by branch manager—Certification not an acceptance—Custom—Contract—Estoppel—No authority in manager to certify post-dated cheques—Bank not liable to holder in due course—Negotiable Instruments Act (*XXVI. of* 1881), *s.* 7.

A banker's business does not normally involve that a manager's authority shall extend to certifying post-dated cheques, and accordingly, where a manager had without authority certified a cheque post-dated to June 20, 1939, by writing on it on June 13, "marked good for payment on 20.6.39," the bank were not liable on the cheque to a holder in due course—a banker who had taken it from the payee as security for an overdraft—when on presentation on due date there were no funds in the drawer's account to meet the cheque.

Forster v. *Mackreth* (1867) L. R. 2 Ex. 163, referred to.

The certification of the cheque did not constitute an acceptance within the meaning of the English Bills of Exchange Act, 1882, or the Indian Negotiable Instruments Act, 1881, which substantially correspond, or the common law. While it cannot be said that a cheque can never be accepted, it is only done in very unusual and special circumstances, and would require strong and unmistakable words.

Dictum of Mansfield C.J. in *Robson* v. *Bennett* (1810) 2 Taunt., at p. 396, that "the effect of that marking is similar to the "accepting of a bill," dissented from.

**Present*:—VISCOUNT MAUGHAM, LORD MACMILLAN and LORD WRIGHT.

There was nothing to justify a finding of custom in Calcutta to identify certification with acceptance. Further, the holder in due course could not claim either in contract on the actual words used in the certification, there being no privity of contract between him and the drawee bank and no consideration passing, or on an estoppel under the doctrine of *Pickard* v. *Sears* (1837) 6 Ad. & E. 469, and *Jorden* v. *Money* (1854) 5 H. L. C. 185, that doctrine being limited to a representation as to an existing fact, whereas here not only were no funds available, but the alleged representation related to the future.

Dictum of Buckley J. in *In re Beaumont* [1902] 1 Ch. 889, at p. 896, adopted.

Judgment of the High Court reversed.

Appeal (No. 11 of 1943) from a judgment and decree of the High Court at Calcutta in its appellate jurisdiction (March 17, 1942), which had affirmed a judgment and decree of that court in its ordinary original civil jurisdiction (June 28, 1940).

The following facts are taken from the judgment of the Judicial Committee: The appellant was a company doing banking business, established in the State of Baroda, under the Baroda Companies Act, 1896–7, and having its registered office in Baroda, with branches in British India. The respondent was a bank incorporated under the Indian Companies Act. Both banks had branches in Calcutta. M. P. Amin was manager of the Calcutta branch of the appellant bank. Bhagwan Das was manager of the Calcutta branch of the respondent bank. One Mitter (respondent No. 2) became a customer of the appellant bank at Calcutta. In May, 1939, one Ghose (respondent No. 3) opened an account with the appellant bank on the understanding that he should be allowed "temporary accommodation from time to time." That account was guaranteed by Mitter. On June 13, 1939, Ghose's account with the appellant bank showed an opening debit balance of Rs. 1,26,339, reduced during the course of the day to Rs. 89,274. On the same date Mitter's account with the respondent bank was overdrawn to the extent of about Rs. 35,000. On that day, Mitter brought to the respondent bank two cheques drawn by Ghose on the appellant bank, both in favour of Mitter and both dated June 13, 1939; both cheques were marked on their face with the words "Marked "good for payment up to 20th June, 1939," and signed by Amin on behalf of the appellant bank. One cheque was for Rs. 1,40,000, and the other for Rs. 1,35,000. Mitter informed Bhagwan Das that the cheques would not be paid until

June 20, 1939, and asked to be allowed to draw Rs. 2,40,000 against them. Bhagwan Das said he wanted a cheque the date of which was the same as that on which payment was to be made. Mitter then took away the cheques and returned a little later on the same day with one cheque dated June 20, 1939, drawn by Ghose on the appellant bank in favour of Mitter or order, for Rs. 2,75,000. The cheque was crossed "& Co.," and on the face of it were written crosswise the words "Marked good for payment on 20.6.39. For the Bank "of Baroda, Limited, M. P. Amin, Manager." It had not been questioned that the signature was that of Amin. Mitter endorsed the cheque generally and handed it to Bhagwan Das, with two letters, in which he asked the respondent bank to credit Rs. 2,75,000 to his account "on realization on due "date," and also requested an overdraft of Rs. 2,40,000, besides the previous balance, which he promised to adjust on June 20, 1939. The respondent bank on the same day gave Mitter its cheque for Rs. 2,40,000, on the Imperial Bank of India at Calcutta, which Mitter duly cashed. The respondent bank debited Mitter's account with the amount.

Meantime, the appellant bank had become suspicious of the conduct of Amin, and had sent two senior officials to keep Amin under observation. On June 19 Amin was suspended, and early next day a notice was sent to the respondent and other banks that Amin's power of attorney had been cancelled and another branch manager appointed. On June 20, the respondent bank, who, though they had not yet received the notice, had become apprehensive, sent their cashier and their accountant to the appellant bank, as soon as it opened for business that morning, to present the cheque marked as above which Bhagwan Das had endorsed generally for Rs. 2,75,000, over the counter for payment. Ghose's account was then in credit to the extent of annas 7 pies 3 only. The appellant bank refused payment, and returned the cheque with a memorandum attached "not arranged for." After some correspondence the respondent bank, on July 31, 1939, commenced the present suit against the appellant bank, and also against Mitter and Ghose. As against the appellant bank, the respondents claimed as holders for value of the certified cheque, and also based their claim on a custom or usage, and, in the alternative, on estoppel. They claimed against Ghose as drawer and against Mitter as endorser. The two latter did not appear, nor did they give evidence at the trial; indeed,

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they were then the subject, along with Amin, of criminal proceedings in connexion with their part in the affair.

The trial judge (Panckridge J.) held the appellant bank liable on the cheque on the ground that they were acceptors, the certification, in his view, constituting an acceptance within the meaning of the Negotiable Instruments Act, 1881, s. 7. On appeal, his judgment was affirmed by the High Court in its appellate jurisdiction (Derbyshire C.J. and McNair J.).

1944. Feb. 21, 22, 23. *Sir Thomas Strangman K.C.* and *Pringle* for the appellant bank. The main question is whether the appellant bank is liable as acceptor of a bill of exchange to the respondent bank as holder on a post-dated cheque marked good for payment by the manager of the appellant bank. Bills of exchange, unless payable on demand, require a stamp ad valorem. In India a cheque does not require a stamp. This instrument was not stamped. Under s. 13, sub-s. 2, of the English Bills of Exchange Act, 1882, a bill is not invalid by reason only of its being post-dated. There is nothing corresponding to that in British India. So far as concerns marking, the practice is (*a*) cheques are marked as between bankers in the intervals of clearing under r. 12 of the Regulations and Rules of the Calcutta Clearing Banks Association ; (*b*) in Calcutta cheques are marked by banks other than the Reserve banks, the Imperial Bank and the Exchange banks, for the purpose of enabling the customer to obtain delivery of goods or documents. The practice does not apply to post-dated cheques. The question whether the marking of the cheque constituted an acceptance of a bill of exchange was not raised either in the plaint or in the issues or, indeed, until the final address by counsel for the respondent bank in the trial court. This marking is not an acceptance. It is not so in form or in effect, and the Negotiable Instruments Act does not contemplate any such thing. Paget on the Law of Banking, 4th ed., p. 164, et seq. sums up the whole of the argument on acceptance. [Reference was also made to *Prince* v. *Oriental Bank Corporation* (1) and *Gaden* v. *Newfoundland Savings Bank* (2).] The appellant bank is not liable on the cheque as acceptor or on any other ground—in contract or on an estoppel—to the respondent bank as holder. The appellate court below rightly held against the establishment of a usage making bankers in Calcutta liable on cheques

(1) (1878) 3 App. Cas. 325.

(3) [1899] A. C. 281, 285.

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marked or certified by them on the presentment of such cheques by parties entitled to present them.

Pritt K.C. and *S. J. Kyffin* for the respondent bank. To a commercial man the appellant bank has in effect written on the cheque a message to any holder in due course admitting liability to pay on the indicated date. This is an Indian case in which, no doubt, English common law is involved to some extent, but the Act is Indian, and the position in England may not have much bearing. In England the facility of marking cheques at the request of customers is not given by bankers—they will not mark at all—so this is an Indian matter only. With regard to acceptance, the question in the light of the Negotiable Instruments Act is, has the drawee of the bill signified his assent thereon? which must mean signified his assent to be liable thereon as a drawee who is liable, or as acceptor. English common law is the basis of the law on this subject, and in *Bellamy* v. *Marjoribanks* (1) it was said "he could not sue the drawee, unless he had accepted the "cheque—a practice not usual, but legal." So here one approaches the construction of the Negotiable Instruments Act with the knowledge that in English common law the acceptance of a cheque is a legal practice. There is no decided case in which a marking bank has been held liable to an outside customer—in England, because the practice hardly exists, though as between bankers they are liable; in Canada, Newfoundland and the United States, because full protection was given by statute: *Gaden* v. *Newfoundland Savings Bank* (2). The argument that the actual writing of those words on the document constituted an acceptance can be put in two ways: (*a*) Looking at the whole practice of banking, though the words vary, it appears to be usual to employ the words "accepted good for payment," and it is submitted that a banker who writes those words on any negotiable instrument which can lawfully be accepted is indisputably accepting it, and the same applies where the words are "marked good for "payment." [Reference was made to Grant's Law of Banking, 7th ed., p. 43, footnote (*d*); p. 683; and to *Ramchurn Mullick* v. *Luchmeechund Radakissen* (3).] As to custom or usage, the trial judge was right in finding it in the respondent's favour. According to the evidence, it is a custom in Calcutta banking that a drawee bank marking a cheque good for payment thereby renders itself liable to pay the

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(1) (1852) 7 Ex. 389, 404.

(2) [1899] A. C. 281, 285.

(3) (1854) 9 Moo. P. C. 46, 69.

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amount thereof to the holder on presentation. The custom must extend to marking post-dated cheques. Assuming that the respondents fail on custom, is there representation or estoppel? That goes only to the Rs. 2,40,000. By the writing on the cheque there are several representations of fact made by the appellant bank, such as "the bank has frozen funds "to meet this cheque," or "binding arrangements have "been made to meet this cheque." Several of the text books think that representation is the right way of putting the matter. By certifying the cheque the appellant bank represented that there were, or would be, assets available to meet it on the due date, and the respondent bank so relied and acted on such representation that the appellant bank is estopped from denying the truth of the representation. The appellant says that at a late stage in the trial the respondent bank sought to turn the cheque into a bill of exchange, and that as such it ought to have been stamped, and that the case must fail on that ground. The answer is that no stamp is required for a bill of exchange payable on demand.

Sir Thomas Strangman K.C. replied, and on estoppel referred to *Dawson's Bank, Ld.* v. *Nippon Menkwa Kabushiki Kaisha* (1).

May 18. The judgment of their Lordships was delivered by Lord Wright, who stated the facts and continued: It was not suggested that either Bhagwan Das or the respondent bank were actually party or privy to the fraud, however irregular from a banking point of view was the discounting of a post-dated cheque, quite apart from the original request to have a single cheque in place of the two brought in the first instance. It does not appear whether the cheque was post-dated at the request of the drawer, Ghose, or of Mitter. It seems that the amount of the cheque was not debited to Ghose's account, and that there was no earmarking of funds or cover for it. Ghose's account was heavily overdrawn when the cheque was taken as security for the loan. It may be said that the respondent bank was not affected by irregularities of indoor management on the part of the appellant bank's manager, of which they had no notice, but the fact that money was lent on the post-dated cheque on June 13, though on its face it was only payable on June 20, and was marked for payment on that date, was a departure obvious on the face of the cheque from any practice there might be in these matters. The respondent bank, however, made no inquiries, and did not question the validity of the certification or marking. The effect of this will be considered later.

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(1) (1935) L. R. 62 I. A. 100, 107.

At the trial before Panckridge J. the evidence called included that of some Calcutta bankers, who deposed on the question of there being a practice in Calcutta to mark or certify cheques, but it is clear that on any view there was no satisfactory evidence that it was usual to certify post-dated cheques. Panckridge J. held the appellant bank liable on the cheque on the ground that they were acceptors, because in his judgment the certification constituted an acceptance within the meaning of the Negotiable Instruments Act, though he went on to hold as a further ground that the evidence showed that bankers at Calcutta are by usage liable on cheques certified by them when presented by parties entitled thereto. He did not deal specifically with the case that the cheque was post-dated.

On appeal, the judgment of the trial judge was affirmed. The Chief Justice, who delivered the judgment of the court, decided the case on the ground that the marking or acceptance of the cheque was in law an acceptance by the appellant bank, and accordingly the question of usage did not arise. He said, however, that the evidence was insufficient to enable him to hold that the custom alleged was established. He was prepared to consider the evidence as showing that banks in Calcutta which mark cheques regard the certification as an acceptance which makes them legally liable to pay, and that they honour their obligation. The Chief Justice did not deal at length with the objections to certifying post-dated cheques, though in the memorandum of appeal it was expressly urged that to certify a post-dated cheque was outside the manager's authority and was outside any custom or usage.

In the court below the pleadings and issues were not very precise or formal, and before this Board the appeal has been presented and argued on the basis of the substantial issues. The first and principal issue was whether the certification amounted to an acceptance within the definition contained in s. 7 of the Negotiable Instruments Act, 1881, which defines an acceptor as the drawee of a bill of exchange who has signed his assent upon the bill, and delivered the same. By s. 6 a cheque is defined as " a bill of exchange drawn on a specified

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"banker and not expressed to be payable otherwise than on "demand."

There is no provision in the Negotiable Instruments Act as to a post-dated instrument such as there is in the English Bills of Exchange Act, 1882, s. 13, sub-s. 2, which says that "a bill is not invalid by reason only that it is ante-dated or "post-dated." There are certain differences between the English Act and the Indian Act, which preceded the former by a year. But substantially the two Acts correspond. Both have been based on the law developed by the English courts as a part of the law merchant, which the common law originally received on the basis of what was proved to the court to be the custom of European business men in their dealings, but which eventually, under the name of the law merchant, was integrated with and became a part of the common law. The law of negotiable instruments was peculiarly adapted to codification, because it was so largely precise and formal. Hence the English Act was described as a codifying Act, and so, in fact, was the Indian Act. Both were based on the English decisions, and hence these and later decisions of either country are commonly cited and relied on. And, in addition, decisions from other common law jurisdictions are frequently cited, as is done by the Chief Justice in the present case. But the law merchant is not a closed book, nor is it fixed or stereotyped. This was explained by Cockburn C.J. in *Goodwin* v. *Robarts* (1). Practices of business men change, and courts of law in giving effect to the dealings of the parties will assume that they have dealt with one another on the footing of any relevant custom or usage prevailing at the time in the particular trade or class of transaction. Hence evidence is admitted of custom and usage, which when juridically ascertained and established become incorporated in the common law. Thus, in the present case, there is an alternative claim based on custom and usage. But the contention that the certification was an acceptance of the cheque is primarily a question of law, to be decided on the terms of the Act and on the authorities, on a correct understanding of the characteristics of a cheque and of the effect of certification.

The main question falls into two parts: one is whether it is legally competent to accept a cheque as if it were a bill within s. 7 of the Negotiable Instruments Act, 1881, and the other is whether certification constitutes an acceptance. Now it is

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(1) (1875) L. R. 10 Ex. 337, 346 et. seq.

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to be noted that, so far as their Lordships know, there is no case in the books of the acceptance of a cheque. This is an arresting fact at the outset, especially when the myriad cheques which have been drawn and paid during all these years are considered. The reason why a contrast is drawn between the acceptance of a cheque, which is a bill of exchange of a special type, and the acceptance of an ordinary bill of exchange depends on the distinction in fact between a bill of exchange and a cheque, which are in many respects different and distinct in their character and origin (see *Goodwin* v. *Robarts* (1)), though in many respects they are analogous. In *Ramchurn Mullick* v. *Luchmeechund Radakissen* (2), this Board, on an appeal from the Supreme Court of Calcutta in a judgment delivered by Parke B., pointed out some of the essential differences: he said that a cheque "is a peculiar "sort of instrument, in many respects resembling a bill of "exchange, but in some entirely different." He said that "in the ordinary course it is never accepted; it is not intended "for circulation, it is given for immediate payment; it is "not entitled to days of grace." (3) In addition, it is to be noted, a cheque is presented for payment, whereas a bill in the first instance is presented for acceptance unless it is a bill on demand. A bill is dishonoured by non-acceptance; this is not so in the case of a cheque, because the holder of a cheque, as between himself and the drawer, has no right to require acceptance. These essential differences (besides others) are sufficient to explain why in practice cheques are not accepted. Acceptance is not necessary to create a liability to pay as between the drawer and the drawee bank. The liability depends on the contractual relationship between the bank and the drawer, its customer. Other things being equal, in particular if the customer has sufficient funds or credit available with the bank, the bank is bound either to pay the cheque or dishonour it at once. There is no point in its saying in effect to the drawer or, indeed, to the holder if it has been transferred, "I will pay if you present it again." It is different in the case of an ordinary bill; the drawee is under no liability on the instrument until he accepts; his liability on the bill depends on his acceptance of it. As between the drawer and his bank, acceptance of a cheque is superfluous. It would be merely a confirmation of the contractual liability of the

(1) L. R. 10 Ex. 346.
(2) 9 Moo. P. C. 46.
(3) Ibid 69.

bank to honour the customer's orders to pay. The customer's right to draw a cheque depends on his having satisfied the contractual conditions which require the bank to honour his mandate to pay the cheque. But if the bank (at least at the drawer's request) accepts the cheque, it should be entitled to protect itself as against its customer by setting aside the appropriate funds standing to the customer's credit. The change in the position of all parties which would follow on the acceptance of a cheque, if regarded as an acceptance under the Act, has led the highest English authorities to lay it down that cheques are not the proper subject of acceptance, or at least to say, as Chalmers stated at p. 292 of the 10th edition of Bills of Exchange, that "a cheque is not "intended to be accepted," though he adds "at common law "there is no objection to the acceptance of a cheque if the "holder likes to take it in lieu of payment." These latter words emphasize the difference for this purpose between a bill and a cheque, and also explain why cheques are not in practice accepted. In *Macbeth* v. *North and South Wales Bank* (1), Lord Alverstone C.J. said: "In ordinary parlance there is "no acceptor of a cheque." It seems that on special occasions bankers do accept cheques drawn on themselves so as to make them payable at one of their clearing bankers, they themselves not being members of the Bankers' Clearing House, but this is rare and exceptional. Both Chalmers (loc. cit.) and Paget, on The Law of Banking, 4th ed., p. 164, are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but if the form be disregarded, it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England as a very limited practice apparently referred to by the court in 1810 in *Robson* v. *Bennett* (2). That is a practice between bankers for the purpose of clearing. It was judicially recognized by Cockburn C.J. in *Goodwin* v. *Robarts* (3) in these words: "A custom has grown up among bankers themselves of "marking cheques as good for the purposes of clearance, by "which they become bound to one another." This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature

(1) [1908] 1 K. B. 13, 18.
(2) (1810) 2 Taunt. 388.
(3) L. R. 10 Ex. 337, 351–2.

and characteristics by the Act. That practice is in Calcutta the subject now of r. 12 of the new Regulations and Rules of the Calcutta Clearing Banks Association, which are exhibited in the documents of this case. Rule 12 says: "It shall be "permissible for any member or sub-member in the intervals "of clearing hours, to apply for the 'acceptance' of a document "by the member or sub-member on which it is drawn, but the "latter shall have the option of issuing a debit note or cheque "in lieu of 'acceptance' of the document." It is to be noted that though it uses the term "acceptance" it puts it in inverted commas, so as to distinguish it from a true acceptance under the Act. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked, and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot, however, be identified with an acceptance.

In the United States the practice of marking or certifying cheques has been established and defined by the different State legislatures in the Uniform Negotiable Instruments Acts. It is presumably this law, as enacted in New York State in 1897, to which the Chief Justice refers in his judgment. The same measure, with trifling variations, has since been made law in the other States of the Union. Their Lordships must therefore briefly advert to this law, which gives a statutory recognition to the certification of cheques. Sect. 187 of the Uniform Act provides that "where a check is certified by "the bank on which it is drawn, the certification is equivalent "to an acceptance." It does not say that the certification is an acceptance, which is dealt with in a different part of the Act. The whole position is, indeed, materially different, as is clear from s. 188, which goes on to define the effect of certification in the following terms: "Where the holder of "a check procures it to be accepted or certified the drawer "and all endorsers are discharged from liability thereon." These sections have led to a great deal of judicial discussion in the courts of the United States, the effect of which is summarized in the standard work of Brannan, Negotiable Instruments Law, 6th ed., p. 1146 et seq. These discussions also show that certification and acceptance are different things under the Act. Certification makes the banker the debtor of the holder, and discharges the drawer altogether if the certification is not made by his procurement. Certification adds a new party, the bank, as primary debtor, and necessarily involves readjusting the legal position of the original parties, drawer and payee. A similar rule has been adopted, it seems, by the courts of Canada, on the basis of the custom in Canada judicially recognized by this Board in *Gaden* v. *Newfoundland Savings Bank* (1). The custom was stated to be that "the "only effect of the certifying is to give the cheque additional "currency by showing on the face that it is drawn in good "faith on funds sufficient to meet its payment, and by adding "to the credit of the drawer that of the bank on which it "was drawn." (2). These last words are not very precise, and their exact effect has not been argued in this appeal. It is not here necessary or proper for their Lordships to attempt to follow in detail the Canadian authorities on this topic. Their Lordships have referred to these matters as tending to support the view that certification is different both in its history and its effects from acceptance, even in jurisdictions in which either by statute or by custom it is declared to be "equivalent" to an acceptance.

But it is different in England and India, where the marking of a cheque has so far been only judicially recognized to import a promise or undertaking to pay as between banker and banker for the purpose of clearance. In the absence of relevant enactment or custom, the issue in England and India as to the effect of the certification of a cheque must be determined by the common law. Their Lordships are of opinion that the certification which is relied on as constituting acceptance of the cheque is not an acceptance within the meaning of the English or Indian Act or the common law. It is not necessary categorically to hold that a cheque can never be accepted; it is enough to say that it is only done in very unusual and special circumstances. The authority which has been strongly founded on by the respondent is *Robson* v. *Bennett* (3), where the practice already mentioned of London bankers to mark cheques presented after banking hours by one banker drawn on another in order to show that the drawer had assets and to show that they would be paid next day at the clearing house, came incidentally into question. The real issue was whether the holder had become bound, as between himself and the drawer, to treat the cheque as good payment

(1) [1899] A. C. 281.
(2) Ibid 285–6.
(3) 2 Taunt. 388.

of the debt for which it had been given; the facts were that the drawee bank had stopped payment the next morning, so that the cheque was not actually paid. The drawer claimed that the holder was bound to treat the cheque as payment because he had been guilty of laches in not presenting the cheque within banking hours on the day on which it was given. In that event the drawee bank, which had not then stopped payment, would have met the cheque because the drawer's account was sufficiently in credit. The Court of Common Pleas rejected this contention, and held that there had been no laches on the part of the holder and that by reason of the practice of bankers the actual presentment which had been made was in good time. Mansfield C.J., in giving judgment, used the phrase that "the effect of that marking "is similar to the accepting of a bill." (1) That was a mere dictum not necessary, or, indeed, relevant, to the decision of the case; the banker was not even a party to the action. Having regard to the custom stated by Cockburn C.J. in *Goodwin* v. *Robarts* (2), quoted above, and the whole tenor of English authority, their Lordships are of opinion that the dictum cannot be justified in English or Indian law. In *Keene* v. *Beard* (3), the question was whether the holder of a cheque could sue the endorser on his endorsement. It was held that he could. No question arose as to the acceptance of a cheque, but Erle C.J., in the course of his judgment observed: "A cheque is strongly analogous to a bill of "exchange in many respects. It is *drawn* upon a banker; "and, though in practice the banker does not *accept* the "draft, he *might* for aught I know do so." (4) Further instances of incidental observations to the same effect, or similar observations in well-known text writers, need not be quoted. Their Lordships repeat that no case is reported in England or India, so far as they are aware, of a banker being held liable, or even sued, as acceptor of a cheque drawn upon him. It would certainly require strong and unmistakeable words to amount to the acceptance of a cheque. That cannot be predicated of the certification here in question, which cannot therefore be regarded as an acceptance unless a custom could be established to treat certifications as acceptances.

If the respondent were entitled to claim against the appellant as on an acceptance of the cheque, there would be

(1) 2 Taunt. 396.

(2) L. R. 10 Ex. 337, 351.

(3) (1860) 8 C. B., N. S. 372.

(4) Ibid 380.

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no defence, unless on the point that the cheque was post-dated. This problem their Lordships will consider later. If that point is for the moment disregarded the respondent's claim may, however, be put forward, in default of it being held that there was an acceptance of the cheque, on the ground that there is a custom which makes the appellant liable, or, alternatively, on the ground that by common law, apart from special custom, the respondent can claim either in contract or on an estoppel on the actual words used in the certification. The Chief Justice, having held that the certification constituted an acceptance, went on to say that the question of usage accordingly did not arise. He added that " before " agreeing with the learned judge that a usage such as he " mentions had been established, I should require further " evidence. . . . I prefer to regard the evidence as showing " that banks in Calcutta, which certify and mark cheques, " regard the certification or marking as being an acceptance " which makes them legally liable to pay the amount thereof " and that they honour their obligations." Their Lordships do not regard these two sentences as necessarily inconsistent. The latter seems to them merely to state that the general habit of business men supports the Chief Justice's decision that in law there was an acceptance. It cannot be intended to substitute a sentiment that banks ought to honour their signature, whether in law binding or not, for the correct legal position when a bank feels entitled or bound to rely on the strict letter of the law and the court is required to decide strictly the legal rights. Their Lordships, agreeing with his decision that the evidence of custom is insufficient, as they think it is both in the number and quality of the witnesses and in the certainty and precision of the evidence given, cannot in view of the decision which he had previously expressed on the issue of custom, treat the sentence as intended to find a legally binding custom. There is, indeed, in the evidence no instance spoken to of a dispute being settled in favour of the alleged custom ; the instances given are comparatively few, and from a few banks, and are mainly instances of the limited custom of bankers in the clearance, which is not questioned. In some cases given in evidence the periods between certification and clearance extend over the week-end, and, in one instance at least, even a few days longer. They can, it seems, be most properly regarded as instances of occasional laxity. But there is nothing to justify the finding of a custom to identify certification with acceptance.

In one essential matter, however, the evidence is not merely too weak to support a custom, but is directly opposed to it. The cheque in question was post-dated. Post-dated cheques are a peculiar species, which have been described as objectionable. The general tenor of the evidence as to them in this case is that it is at the lowest unusual to certify post-dated cheques, indeed that it is almost unknown. Bhagwan Das said that he had never certified a post-dated cheque. As to the actual certification on the particular cheque in question, he said that he took it as a representation that the appellant bank would meet the cheque on a future date, and he said he would feel no difficulty in marking a post-dated cheque, though he did not directly answer the question whether it was usual to do so, but merely said " there is no " harm," and later that it was done in rare cases. He also said that this was the only instance in which while at Calcutta he had advanced money on a post-dated cheque. His view of the law was that by marking or certifying the cheque they became in a way the drawers of it. Another of the respondent's witnesses said that he did not think he had certified a post-dated cheque or accepted (that is taken) a post-dated cheque certified by another bank. But he expressed his view that if he certified the cheque his bank would be liable. Another witness called by the respondent said that it was not usual to certify a post-dated cheque, though in answer to a leading question on re-examination, he agreed that a bank was bound to pay a certified post-dated cheque. Another of the respondent's witnesses said that he would not discount a certified post-dated cheque ; he would feel there was something suspicious in the transaction and would make inquiry. The appellant was content in the main to point out the inadequacy of the respondent's evidence.

In their Lordships' judgment, the evidence of custom fails, as the Chief Justice held. As to the alternative claim in contract or on an estoppel, that claim in their judgment also fails. The certification must for this purpose be construed according to the proper meaning of the words used in their setting, and independently of the doctrine of negotiability, which is the creation of legislation or established usage. If legislation or usage is ruled out, as in this case it must be, the question is whether the words read in their context, that is, as appearing on a cheque, import a promise by the certifying bank to pay the amount of the cheque whether or not there are funds to meet it, and if they do, whether there is any privity of contract between the respondent and the appellant, and, if there is, whether there is consideration for the promise as between these parties. If the certification on the cheque had been negotiable, as an acceptance in the proper sense would have been, the respondent bank would prima facie have been entitled to claim as a holder in due course, having given value to its immediate transferor, and would not be concerned with the state of accounts or the equities between the appellant bank and Ghose or Mitter, to one or both of whom the certification was issued. But this is not the case unless the certification amounted not merely to a promise but a negotiable promise by the appellant. The respondent bank must show privity of contract between itself and the appellant bank, whereas there was privity of contract only as between the appellant bank and either Ghose or Mitter, or perhaps both. The respondent bank claims as a holder in due course, and must so claim. If it claimed as assignee or agent for collection, it would have no better title than its assignor or principal. But in addition there clearly was no consideration passing to the appellant from the respondent. There was thus no enforceable contract, even if the certification could be construed according to its terms as a contract to pay. Their Lordships doubt whether, on this ground, no custom being established, the words of the certification could be so construed. They might be construed as words of representation, as to the genuineness of the cheque and of the signature. If the cheque had not been post-dated, the certification might also be held to include a representation as to the then sufficiency of the drawer's account. But as the cheque was not due for payment until seven days later, a representation as to the then position would not go very far. If it was to be construed as a representation that on the due date there would be funds available, it necessarily amounted to a promise, and the want of consideration would be fatal to its enforceability. The promise, if any, was a non-negotiable gratuitous promise given either to Ghose or Mitter, or to both, to lend the money when June 20 came. Their Lordships adopt the language of Buckley J., used in a different context in *In re Beaumont. Beaumont* v. *Ewbank* (1), " No right

(1) [1902] 1 Ch. 889, 896.

"had been acquired by the drawee, but an expectation only. "Even if the manager did not change his mind, still an "agreement to lend is not enforceable, and no right of property "had passed to the drawee." What was in question there was a donatio mortis causâ of a cheque which the manager of the bank had said would be met. But the principle stated has an application to the certification here. What was said could have been revoked or disowned. It was not binding; there was no appropriation of funds or declaration of trust involved in the certification, because there were in fact no funds available on the 13th or indeed the 20th. Nor could the certification be construed as an estoppel on which the respondent could claim on the doctrine of *Pickard* v. *Sears* (1) and *Jorden* v. *Money* (2), because that doctrine is limited to a representation as to an existing fact, whereas not only were no funds available, but what is called the representation related to the future. Even if funds had been available and had been "frozen," the bank would be entitled to release them before the 20th, in the absence of a binding promise to maintain them. It was only to the position in the future when the time for payment arrived, that the certification had reference, and whatever language was used, it necessarily amounted, if it was to be effective, to a promise or nothing. From the point of view of a court of law, a gentlemen's agreement or honourable obligation, however important in business, has no validity.

But behind all these considerations lies the circumstance that the cheque was post-dated. The question of certifying a post-dated cheque has been adjudicated upon in the United States. It has there been held that there is no authority implied by law for an officer of a bank to certify a cheque until on or after the date when it is made payable, and that anyone taking a post-dated cheque before the day of its date is put upon inquiry. As to this reference may be made to Brannan op. cit. p. 1152. There do not seem to be any English cases on the point, presumably because the practice of certifying cheques is not judicially or legislatively established in England, and the same is true of India. It was, however, held in *Forster* v. *Mackreth* (3) that a partner had no authority to bind his firm, who were solicitors, by a post-dated cheque any more than he had authority to bind the firm by a bill of

(1) (1837) 6 Ad. & E. 469.
(2) (1854) 5 H. L. C. 185.
(3) (1867) L. R. 2 Ex. 163.

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exchange. No doubt the reason for denying ostensible authority is in some aspects different in the one case from that in the other. But in each case it depends on the nature and normal exigencies of the business, and a banker's business does not normally involve that a manager's authority should extend to certifying, and still less making a loan against, a post-dated cheque. The Chief Justice deals shortly with the difficulty by holding that the post-dated cheque was in law a bill of exchange at seven days' date, which on June 20 became a bill of exchange payable on demand and therefore a cheque. But the material date in this context is that of the certification, issued when the bill or cheque was not due. A post-dated bill is under the English Act, s. 13, sub-s. 2, not invalid by reason only that it is post-dated. There is no similar provision in the Indian Act, but the same result would, it seems, follow from the common law, and the position of a post-dated cheque is recognized in the Indian Stamp Act. But the material invalidity is that of the certification, taken in connexion with the fact that the cheque was post-dated. The true anomaly or invalidity consists in the attempt to apply certification to a cheque before it is due. Certification of a cheque when it is due may have operative effect and be valid as being directed to a cheque due in praesenti, such certification being presumably followed by debiting the drawer's account with the amount. This is particularly apparent when regard is had to the American or Canadian theory, that certification is equivalent to payment. It is impossible to treat the cheque as paid before it is due. The position might be different in jurisdictions where by law or custom certification is equivalent to acceptance, but nothing of the sort is applicable here. Even in such cases the difficulty of saying that there was constructive payment would remain. It is not easy to see why novel and anomalous theories should be invented to justify an unusual and unnecessary proceeding. This case can, however, be decided simply and sufficiently on the ground that the ostensible authority of the manager did not extend to cover the certifying of post-dated cheques, and that in the present case the manager had no actual authority to do so. The bank accordingly was not bound. This in itself would be a sufficient ground for rejecting the respondent's claim.

Their Lordships are not unconscious that bankers regard their word as their bond, and honour their signature even though they might have an answer in law. This is especially true as between banker and banker. Bankers would say that the bank making the mistake, or whatever it was, should stand by its act. But in circumstances such as those of the present case, the mistake in certifying the cheque would have done no harm, if it had not been for the act of the other banker in discounting it, though the defect was apparent on its face. A lawyer would be disposed to hold that the responsibility lay with the latter bank. In any case, the court is here called on to decide how the law at present stands. It is not the arbiter on questions of banking ethics or etiquette or good banking policy as a matter of business. The high standards of bankers are too firmly established to be shaken.

On the whole case their Lordships are of opinion that the action of the respondent should fail. They think that the appeal should succeed and the judgment for the respondent should be set aside, and the action dismissed with the costs in the courts below and of the appeal. They will humbly so advise His Majesty.

Solicitors for appellants: *Sanderson, Lee & Co.*
Solicitors for respondents: *Douglas Grant & Dold.*

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[PRIVY COUNCIL.]

SIDEY . . . . . . APPELLANT;

AND

PERPETUAL TRUSTEES ESTATE AND AGENCY COMPANY OF NEW ZEALAND, LIMITED, AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Will—Gift per stirpes—Stocks of descent—Construction.

There is no rule of construction of wills which requires a stirpital division to begin at one generation rather than another. In every case the result must depend on the language used in the will, and the context in which it is employed, and there is, in principle, no reason why in the construction of a gift per stirpes the stocks should be found among the takers and not among their ancestors.

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* *Present*—VISCOUNT SIMON L.C., LORD THANKERTON, LORD WRIGHT, LORD PORTER and LORD SIMONDS.

Robinson v. *Shepherd* (1863) 4 De G. J. & S. 129, and *Gibson* v. *Fisher* (1867) L. R. 5 Eq. 51, considered.

A testator who died leaving him surviving four children, one of whom died without leaving issue, provided by his will, inter alia, that "from and after the death of the last survivor of my said "four children. . . . I give devise and bequeath the whole of "my residuary estate real and personal to and amongst my then "surviving descendants in such manner that the same shall be "divisible per stirpes among the children grandchildren and "remoter issue of such of my children as shall have left issue":—

Held, that the testator's own children who had issue living at the date of distribution, and not his grandchildren themselves living or having issue living at that date, formed the stocks for the purpose of the prescribed stirpital division, and the estate was, accordingly, divisible into three equal parts to go per stirpes to the issue of each of the three children who left issue.

Order of the Court of Appeal [1942] N. Z. L. R. 251, reversed.

APPEAL (No. 61 of 1943) from an order of the Court of Appeal of New Zealand (April 1, 1942) made on an originating summons dated December 19, 1941.

The following facts are taken from the judgment of the Judicial Committee: This appeal raised a question as to the true construction of the will of John Sidey, who died in the year 1915. By his will, which was dated November 18, 1911, the testator, after making a specific devise and certain specific and pecuniary bequests, including an annuity of 1,000*l.* to his wife during her life, appointed his two sons, Thomas Kay Sidey and Arthur Murray Sidey, and his two daughters, Jessie Ann Adam and Eliza Johanna Jolly, executors and trustees thereof, and gave his real and personal estate not thereby otherwise disposed of to his trustees on trust for conversion and investment. He then directed his trustees to stand possessed of the whole of his residuary estate and the investments representing the same on the following trusts. The numbering of the clauses was not in the original will, but has been adopted for the sake of convenience: "21. After providing for the annuity "hereinbefore given to my wife for her life all legacies and other "outgoings directed by this my will to be paid in trust to pay "the income thereof as follows that is to say:—22. To each "of my two grand-daughters (the daughters of my said daughter "Jessie Ann) I give an annuity of 100*l.* for her life. 23. To "each of my two said daughters Jessie Ann and Eliza Johanna

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" and after their deaths respectively to their issue equally " amongst them I give an annuity of 500*l*. 24. To my said " son Arthur Murray Sidey and after his death to his issue " equally amongst them I give an annuity of 1,200*l*. 25. And " to my son Thomas Kay Sidey and after his death to his issue " equally amongst them I give the whole of the remaining " income of my said trust estate year by year after paying " thereout the respective annuities or yearly payments above " specified. 26. And from and after the death of the last " survivor of my said four children I declare that the said " several annuities or yearly payments to my said children and " their issue shall cease and determine (except the annuities of " 100*l*. each to my two grand-daughters). 27. And from and " after the death of the last survivor of my said four children " as aforesaid I give devise and bequeath the whole of my " residuary estate real and personal to and amongst my then " surviving descendants in such manner that the same shall " be divisible per stirpes among the children grandchildren " and remoter issue of such of my children as shall have left " issue. 28. And I declare that during the minority of any " of the issue who may take a benefit hereunder it shall be " lawful for my trustees to pay the presumptive share or so " much of it as they shall think requisite of such child to his " or her parent or guardian or to the person for the time being " having the actual custody of such child without the calling " upon such parent or person for any account of the expenditure " thereof or otherwise to apply the same for the benefit of such " child in such manner as they or he in their or his absolute " discretion shall think fit. 29. And I further declare that in " such case whenever there are two or more of such children " of one of my children or of his or her issue then my trustees " shall not be bound to divide such income but may similarly " pay or apply the same or any part thereof generally to such " parent or guardian or for the benefit of such children. " 30. And I further declare that no grandchild or remoter " issue of mine shall take a vested share in the income or capital " of my estate until being a male he shall have attained the " age of twenty-one years or being a female she shall have " attained that age or married under that age. 31. And I " further declare that such part of the presumptive shares of " any of my issue as shall not be paid or applied during his or " her minority for the benefit of any of my grandchildren or " remoter issue shall be accumulated as income for his or her

" benefit until he or she shall attain the age of twenty-one " years or being a female attain that age or marry and if he " or she shall not live to obtain a vested interest therein the " same shall be added to the capital shares of his or her brothers " and sisters if any and if he or she shall have no brother or " sister the same shall be added to the capital of my trust " estate." The testator had four children only, namely, the two sons and two daughters named in his will. Of those, the last survivor was his daughter Jessie Ann Adam, who died on June 3, 1941. At that date, therefore, the capital of the testator's residuary estate became distributable under cl. 27 of his will. At the same date the position of the testator's family, so far as was material to this appeal, was as follows: (1.) The son, Thomas Kay Sidey, had one child only, namely, the appellant Thomas Kay Stuart Sidey, who was of full age; (2.) the son, Arthur Murray Sidey, had four children, namely, the respondent, Lorna Murray Lewin, and three others, all of them living and of full age; (3.) the daughter, Jessie Ann Adam, had three children living and of full age and another son who died long since leaving one child then living and of full age; (4.) the daughter, Eliza Johanna Jolly, had no child. From that recital it would appear that if, as the appellant contended, the testator's own children were to be taken as the stirpes for the purpose of the stirpital division of the residuary estate, which was directed by cl. 27 of the will, the distribution would be primarily in thirds, of which the appellant would take one-third, the four children of Arthur Murray Sidey would between them take another third, and the three surviving children of Jessie Ann Adam and the child of her deceased child would between them take the remaining third. If, on the other hand, as was contended by the respondent, Lorna Murray Lewin (who was appointed in these proceedings to represent all those descendants of the testator whose interest was the same as her own), the grandchildren of the testator were to be taken as the stirpes for the purpose of such division, then the distribution would be in ninths, each of the eight surviving grandchildren taking one-ninth and the great-grandchild representing the stirps of the deceased grandchild taking the remaining ninth. It was the latter view which commended itself to the Court of Appeal in New Zealand by a majority of four judges to one, Northcroft J. dissenting from the opinion of Myers C.J. and Blair, Kennedy and Callan JJ.

1944. June 7. *Gray K.C.* and *Rawlence* for the appellant. Where a testator settles property on trusts for the benefit of his own children during their lives and subject thereto on trusts for the benefit of his remoter issue per stirpes, then, unless the will contains some clear indication of a contrary intention, the natural inference is that his intention was that his own children rather than his grandchildren should be the stocks to be taken for the purposes of the stirpital division. It must always be a question of the construction of the will, and the scheme of the will here, read as a whole, supports the view that the benefit of the interests given by the testator in his residuary estate should primarily be for each of his four named children and their respective issue as separate groups or stirpes. The gift to his descendants per stirpes did indicate that he intended his own children to be the first set of stocks proceeding from him. There is no dispute between the parties as to the meaning of " per stirpes." It is said by the respondent, and the Court of Appeal have accepted the view, that, where there is a gift to the descendants of a person per stirpes and it is found that the first generation are not the first takers, it is the stocks of the generation first takers that are to be the decisive element in determining which stocks are to be taken, and it is said that there is a general rule of construction to that effect laid down in *Robinson* v. *Shepherd* (1). That case, however, was only a decision on the particular language of the will there under consideration and did not lay down or purport to lay down any general rule of construction. In any case, there is no such general rule. *Gibson* v. *Fisher* (2) went the other way, and so far as it cannot be reconciled with *Robinson* v. *Shepherd* (1) the reasoning in *Gibson* v. *Fisher* (2) is to be preferred, as would appear to have been the view in *In re Alexander* (3 of Sargant J., who, however, followed *Robinson* v. *Shepherd* (1), as did also the cases of *In re Wilson* (4) and *In re Dering* (5). One vital difference between those cases and this is that in none of them was the gift to the descendants of the testator. It was always to the descendants of other people. Further, there is not here any suggestion, as in some of those cases, that there was to be an equal division. Reliance is placed on the dissenting judgment of Northcroft J., which puts the case clearly and correctly. On the true construction of the will

(1) (1863) 4 De G. J. & S. 129.
(2) (1867) L. R. 5 Eq. 51.
(3) [1916] 1 Ch. 371.
(4) (1883) 24 Ch. D. 664.
(5) (1911) 105 L. T. 404.

the children of the testator should be taken as the stocks for the stirpital division.

Christie K.C. and *J. A. Reid* for the respondent, Lorna Murray Lewin. At cl. 27 the testator is taking an entirely new step. He is giving his estate at that stage to his grandchildren. There is a complete break. He is making an original gift to the grandchildren, and not in succession to their parents. If he had intended to deal with the families of his own children it would have been easy to say so. Prima facie, when there is a gift to a class of persons, and it is to be distributed among that class consisting of several generations per stirpes, then the stirps, the stocks, must be found among the legatees. The testator's own children are not legatees. They are only mentioned to identify the persons who are the grandchildren. *In re Rawlinson* (1) affords an example of what the testator might have done had he wished to accomplish the purpose for which the appellant has argued. Where no contrary intention is expressed the natural construction of a gift to persons per stirpes is that the stocks of descent shall be found among the takers and not among their ancestors. The will here contains no indication of any contrary intention. By "first taker" is meant the eldest generation which is capable of taking, and the eldest possible takers here are the grandchildren who are inheriting, not in succession to their parents, but as legatees. This case is covered by *Robinson* v. *Shepherd* (2), the reasoning in which is to be preferred to that of Lord Romilly M.R. in *Gibson* v. *Fisher* (3). In any event, the decision in *Robinson* v. *Shepherd* (2) has stood for eighty years and has been followed in *In re Wilson* (4), *In re Dering* (5) and *In re Alexander* (6). It is significant that the only cases on the point, except *Gibson* v. *Fisher* (3), are cases where the court came to the conclusion that the persons who ought to be taken as stocks were the eldest generation of legatees—the construction for which the respondent contends. It is true that Lord Westbury L.C. in *Robinson* v. *Shepherd* (2) did not purport to lay down a rule of construction, but his view should be regarded as an established rule of construction in the Chancery Division, and that of Lord Romilly M.R. disregarded. You must seek for the stock among the persons to whom the estate is given; that is the guiding principle.

(1) [1909] 2 Ch. 36, 38.
(2) 4 De G. J. & S. 129.
(3) L. R. 5 Eq. 51.
(4) 24 Ch. D. 664.
(5) 105 L. T. 404.
(6) [1919] 1 Ch. 371.

J. A. Reid followed.

Lord Meston for the respondent the Perpetual Trustees Estate and Agency Company of New Zealand, Limited.

July 5. The judgment of their Lordships was delivered by LORD SIMONDS, who stated the facts and continued: Their Lordships, on a consideration of the whole of the relevant provisions of this will, have come to the conclusion that the view of Northcroft J. is to be preferred. It does not appear to them that the authorities, to which reference will be made later, afford any real guidance on the construction of the will now under consideration. They cannot accept the suggestion made in the argument of this appeal that there is any rule of construction which requires a stirpital division to begin at one generation rather than another. In every case the result must depend on the language that is used and the context in which it is used.

In the will now under review the testator, by cls. 22 to 26 inclusive, dealt with the income of his residuary estate until the death of the last survivor of his four children, making separate provision during that period for each child and the issue of each child. By cl. 27 he provided for the distribution of the capital of the estate. To this clause further reference will be made. By cls. 28 to 31 the testator made further provisions which appear to be mainly, if not entirely, referable to the disposition made by cl. 27, and, though too much weight should not be given to clauses which are of an ancillary character, the language of cl. 31 in particular is favourable to the view that the stirpital division should proceed on the footing that the testator's own children were the stirpes. Clause 30 having, by way of limitation or qualification of cl. 27, provided that no grandchild or remoter issue should take a vested share in the income or capital of the estate until being a male he had attained the age of twenty-one years or being a female attained that age or married, provision is made by the latter part of cl. 31 for the event of such a person not attaining a vested interest. If the stirpital division was based on each grandchild being a stirps, it would be consistent that on a grandchild failing to attain a vested interest, the share of that grandchild should go over to the other stirpes, i.e., to the other grandchildren or their representatives, but cl. 31 does not so provide. On the contrary, it provides that the share of a grandchild failing to attain a vested interest is to be added to the capital shares of his or her brothers or sisters, if any.

This is precisely the provision to be expected if the testator's own children constituted the stirpes, for, if the children of a child represent one stirps and take one share between them, the share of one of them dying without attaining a vested interest would naturally go to his brothers or sisters.

It is, however, primarily on the language of cl. 27 itself that the question must be determined. Its opening words cannot be wholly disregarded. The event for which the testator now provides is the death of the last survivor of his four children for whom and their issue he had previously made separate provision out of income. On this event happening he gives the whole of his residuary estate " to and amongst my then " surviving descendants in such manner that the same shall be " divisible per stirpes amongst the children grandchildren and " remoter issue of such of my children as shall have left issue." As this clause opens with a reference to the testator's four children, so it ends with a reference to such of his children as shall have left issue. This framework suggests that for the testator each child established the stirps for which he was making provision. The class of beneficiaries is " my then " living descendants," and some assistance again may be derived from the use of the word " my." There seems no reason why a testator, providing for his own descendants living at a certain time, but intending them to take not per capita, but per stirpes, should pass over the generation of his own children and direct, not that each of their families should take an equal share of his estate between them, but that each of his grandchildren or their families should take an equal share. Then come the decisive words. The testator's estate is to be divided among his then surviving descendants " in such manner that the same shall be " divisible per stirpes among the children grandchildren and " remoter issue of such of my children as shall have left issue." But for this provision the estate would presumably have been divisible among all the testator's living descendants per capita, every member of every generation taking an equal share. The effect of this provision is two-fold. In the first place, as is conceded by both sides on this appeal, it qualifies the generality of the expression " my then surviving descendants " and operates to preclude a remoter descendant from taking in competition with his own living ancestor so that in a particular line, for example, a great-grandchild could take no share if his parent, being a grandchild of the testator, was living at the date of distribution. But, in the second place, it operates, or

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may operate, to alter the proportions in which the participating descendants share in the estate. For the provision demands that the division should be, not according to the number of capita, but according to the number of stirpes, and, as the present case illustrates, the participating descendants may take in different proportions according to the generation which is determined to be the stirps.

Thus, it becomes necessary to determine in this case whether the testator's own children, who have issue living at the date of distribution, or his grandchildren, themselves living or having issue living at that date, form the stirpes for the purpose of the prescribed stirpital division. The argument in favour of the latter view which appears to have been decisive in the Court of Appeal and has been urged with much force before their Lordships, is that the natural construction of a gift to persons per stirpes is that the stocks of descent shall be found among the takers and not among their ancestors. It has been contended that this has been accepted as a principle of construction since the decision of Lord Westbury in *Robinson* v. *Shepherd* (1), and this consideration has largely influenced the decision of the learned Chief Justice and the other judges forming the majority of the Court of Appeal. It is the fact that in the case cited the Lord Chancellor, on the language of the will under consideration, came to the conclusion that legatees who themselves participated were to be regarded as forming the stirpes, and that this line of reasoning commended itself to North J. in *In re Wilson* (2), and to Warrington J. in *In re Dering* (3), on the construction of wills which appeared to those learned judges to be similar to that under review in *Robinson* v. *Shepherd* (1). And in *In re Alexander* (4), Sargant J. felt himself constrained to follow the same line of reasoning and to reach a similar result, though his inclination and preference were for the view expressed by Lord Romilly in *Gibson* v. *Fisher* (5). Their Lordships do not think it necessary to question the correctness of any of the decisions to which reference has been made, but they cannot elevate the reasoning which led to such decisions into a rule of construction. There appears to them on principle to be no reason why, in the construction of a gift per stirpes the stocks should be found among the takers and not among their ancestors. In the simplest case, where a gift is made to a number of persons of different stocks, but of the same generation per stirpes and not per capita, it is manifest that the stocks are to be found, not in the takers, but in the ancestors, and this result is reached, not by the displacement of any prima facie rule of construction, but by the consideration of the language of the gift without any predilection. The language of the will under appeal is to be approached in the same way.

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(1) 4 De G. J. & S. 129.

(2) 24 Ch. D. 664.

(3) 105 L. T. 404.

(4) [1919] 1 Ch. 371.

(5) L. R. 5 Eq. 51.

Reference has already been made to the scheme of the will and to the indications to be found in the clauses which precede and follow cl. 27. That clause, as has also been observed, opens and ends with references to the testator's own children. It is the final reference which affords the clearest indication of the testator's intention. If the division had been directed " per stirpes among the children of such of my children as shall " have left issue " it could not have been doubted that the testator's own children leaving issue formed the stirpes. Or again, if the division had been directed " per stirpes between " the issue of such of my children as shall have left issue " the same conclusion would be reached, for the stirpes are directly associated with the children who have left issue, and there would appear to be no reason why any particular remoter generation should form the stirps, if a child of the testator does not. So, also, if the issue are written out at length as " the children, " grandchildren or remoter issue of such of my children as shall " have left issue." The introduction of the remoter generations into the gift by way of explanation of the words " my then " surviving descendants " is for the purpose of substituting such remoter generations for earlier generations of which there are no living representatives. The framework of the gift remains one in which the final reference is always to the testator's own children who have left issue surviving at the relevant date. It is, in their Lordships' view, these children who form the stocks of descent. This construction of cl. 27 is entirely consistent, as no other construction is consistent, with the provisions of cls. 30 and 31. The testator's estate, accordingly, became divisible on the death of the survivor of his children into three equal parts and those three parts will be distributable in the manner already indicated, i.e., the appellant will take one-third, the four children of Arthur Murray Sidey will take another third between them, and the three surviving children of Jessie Ann Adam and the child of her deceased child will take the remaining third between them. The costs

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as between solicitor and client of each party of this appeal will be paid out of the estate. Their Lordships will humbly advise His Majesty that the appeal ought to be allowed accordingly.

Solicitors for appellant: *Sandilands & Co.*

Solicitor for respondent Lorna Murray Lewin: *Stibbard, Gibson & Co.*

Solicitor for the respondent the Perpetual Trustees Estate and Agency Company of New Zealand, Limited: *Archibald R. Kirk.*

Applied. GOLD COAST SELECTION TRUST, LTD. *v.* HUMPHREY. [1948] 2 All E.R. 379.

H. L. (E.)*
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Feb. 14, 15, 16, 17, 21, 23 24, 28; *May* 19.

Considered. CHIBBETT (INSPECTOR OF TAXES) *v.* HAROLD BROOKFIELD & SON LD. [1952] 2 Q.B. 677

ABSALOM . . . . APPELLANT;

AND

TALBOT (INSPECTOR OF TAXES) . . . RESPONDENT.

Revenue—Income Tax—Assessment—Profits—Sales of houses by builder—Part of purchase price advanced by building society on security of first mortgage—Balance advanced by builder on security of second mortgage—Inclusion as trading receipt in year of sale—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. D, cases I and II, r.* 3 (*i.*).

The appellant was a speculative builder erecting working class houses for sale. The purchasers generally paid only a small deposit and the greater part of the balance was advanced on first mortgage by a building society, the appellant advancing the remainder of the balance on the security of a second mortgage under which the debt was repayable with interest by instalments, and in some cases accepting promissory notes. Assessments to income tax having been made on the appellant under the provisions of case I of sch. D. to the Income Tax Act, 1918:—

Held (per Lord Atkin, Lord Thankerton and Lord Russell of Killowen, Viscount Simon L.C. and Lord Porter dissenting) that the sums agreed to be paid to the appellant over a period of years should not be assessed on him for income tax in the year of the contract as profits of his trade for that year at the face value of the sum agreed to be paid.

Per Lord Atkin and Lord Thankerton: The appellant should be assessed in the year of the contract on the value of the debts in that year.

Per Lord Russell of Killowen: The appellant should be assessed in any year in the amount of the actual purchase moneys falling to be paid in that year.

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* *Present*—VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN and LORD PORTER.

Gleaner Co., Ld. v. *Assessment Committee of Jamaica* [1922], 2 A. C. 169, criticized.

Decision of the Court of Appeal reversed.

Appeal from the Court of Appeal.

The facts, stated by Viscount Simon L.C. and Lord Atkin, were as follows: The appellant was a speculative builder who retired from his business on December 31, 1937. In the years of assessment ending April 5, 1935, to April 5, 1938, he was engaged in building industrial dwellings which he sold to members of the working class. The business procedure was that the purchaser agreed to buy a house at a certain price, arrangements having already been made that a building society would advance him a proportion of the price on a mortgage, the debt being repayable by instalments over a period of years. The purchaser would provide a small sum in cash, and this cash payment, with the amount provided by the building society, would be handed to the appellant on completion. The balance the purchaser agreed to pay to the appellant by instalments covering principal and interest over a period which might extend to more than twenty years, and payment was secured by a second mortgage granted to the appellant. Payment of part of this balance was sometimes secured by the purchaser signing a promissory note payable by monthly instalments over a period of four or five years.

Documents annexed to the case stated set out the transactions of the appellant with two typical purchasers, James Mayhew and William Hearnden. In March, 1933, the appellant sold to James Mayhew described as a "labourer "(R.A.S.C.)" the fee simple of a house on a building estate in Kent. The price of 425*l.* was to be provided first by a cash deposit of 40*l.* made by the purchaser and by 320*l.* paid by a building society which took a first mortgage from the purchaser. The balance of 65*l.* was then provided by a loan from the appellant to the purchaser which was secured by a second mortgage, under which the purchaser bound himself to pay to the appellant the sum of 65*l.* on September 30, 1933, with interest at the rate of 5*l.* 10*s.* 0*d.* per cent. per annum. It was provided that, if the purchaser paid the sum of 65*l.* with interest by equal monthly payments of 8*s.* 2*d.*, the appellant would accept payment of the principal sum and the interest thereon by the said instalments. In the case of William Hearnden the balance advanced by the appellant was secured by a second mortgage and a promissory note.

Four assessments to income tax in the sums of 87,000*l.*, 48,000*l.*, 24,000*l.*, and 30,000*l.*, for the years ending April 5, 1935, to April 5, 1938, inclusive, were made on the appellant under the provisions of case I of sch. D to the Income Tax Act, 1918. The appellant appealed and evidence was given that in his accounts, which were kept on the basis of the calendar year, there had been allowed in every year a deduction for debts, secured by second mortgages or promissory notes, which proved to be bad. The appellant contended (inter alia): "(a) that the sums receivable under the second "mortgages or promissory notes fell to be valued at the time "of the sale of the houses at their actual value at that time "and not at their face value; (b) that, if a valuation be "found to be impracticable, then the sums received under "the second mortgages or the promissory notes are assessable "as trading receipts in the trading years in which they are "received." The respondent, the inspector of taxes, contended (inter alia): "that the amounts owing to the appellant secured "by second mortgages or promissory notes were trade debts "the amount of which must be brought into account except "in so far as a deduction were permissible in respect of bad "or doubtful debts under the provisions of r. 3 (i.) of the rules "applicable to cases I and II of sch. D." The Special Commissioners held "that on the granting of a second mortgage "or promissory note by the purchaser of the appellant's "houses a trade debt, due from the purchaser to appellant, "was created, and that, in computing his liability to income "tax, it must be included. These debts, if and when proved "to be bad, would be allowable as deductions in the normal "manner." Macnaghten J. and the Court of Appeal (Luxmoore and du Parcq L.JJ., Scott L.J. dissenting) affirmed this decision. The appellant appealed to the House of Lords.

King K.C. and *Bowe* for the appellant. In the case of a trade, income tax is computed on the full amount of the balance of profits or gains in the relevant year. In reckoning the profits arising or accruing to the trader each year of account must be taken by itself. In the present case the trader was a speculative builder whose business consisted in buying land, putting buildings on it, and selling both. If he had been selling for cash his profits could have been found by placing on the credit side the purchase considerations received by him and on the debit side the cost of the land and

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buildings. In the present case the right method would be to value the circulating capital employed in the trade at the terminal dates, comparing the respective figures and treating the surplus as the profit arising or accruing for that year. The appellant was not entitled to receive the nominal sale prices of the houses, and, accordingly, they did not fall to be included as trading receipts in the year of sale. The payments secured by second mortgages or promissory notes should be valued as at the time of the sale of the houses to which they relate, their actual value at the time and not their face value being brought into account in computing profits. The amount of their face value cannot be treated as a trading receipt arising or accruing in the year of sale, since the appellant must wait twenty years to receive it. Also, it cannot be said that second mortgages payable in twenty years' time are worth their face value. Contingencies, such as the possibility of the mortgage breaking down, must be considered. The asset must be valued on the basis of what the appellant can "cash in on" at the time of the sale: see *Harrison* v. *John Cronk & Sons, Ld.* (1) and *John Emery & Sons* v. *Inland Revenue Commissioners* (2). The fact that in the deed of transfer of a house there is a conveyancing statement that the purchaser, who admittedly could only pay a small cash deposit, was acknowledged to have paid the full purchase price can be ignored save in so far as it has a conveyancing value. It does not imply that the appellant received it, either notionally or in fact. The substance of the transaction was that the appellant sold for a consideration in money and money's worth and the latter part must be valued as at the time of the completion of the sale. No ground is afforded by r. 3 (i) of the Rules applicable to cases I and II of sch. D for requiring the inclusion on the credit side of the account for any year of amounts not due for payment in that year. Their inclusion would be outside its scope. It permits a deduction from the face value of the debt only in the year in which it is brought into account: *Gleaner Co., Ld.* v. *Assessment Committee of Jamaica* (3). The right to make a deduction in respect of bad or doubtful debts in years subsequent to that of the transaction creating the debt rests only on the benevolent practice of the revenue. In the alternative, if the method of valuation contended for be rejected, the

(1) [1937] A. C. 185.

(2) [1937] A. C. 91.

(3) [1922] 2 A. C. 169.

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computation of profits must be on the basis of the amounts actually received by the appellant or accrued due in a particular year. [They also referred to *Scottish & Canadian General Investment Co., Ld.* v. *Easson* (1) and *Lock* v. *Jones* (2).]

Sir David Maxwell Fyfe S.-G. and *R. P. Hills* for the respondent. The assessments were rightly made on the appellant. This case is governed by the ordinary principles that apply to a sale on credit, namely, that credit must be taken in the accounts for the year of sale for the purchase consideration of the goods or property sold, subject to such allowance for bad or doubtful debts as is sanctioned by r. 3 (i.) of the rules applicable to cases I and II of sch. D. Nothing turns on these transactions being concerned with the sale of houses, as there is no evidence of any special commercial practice. Accordingly, the normal commercial practice should be taken as governing this class of case and the profits should be ascertained on the ordinary principles of commercial trading. *John Emery & Sons* v. *Inland Revenue Commissioners* (3) and *Harrison* v. *John Cronk & Sons, Ld.* (4) have no application to the present facts. In neither case was there any question of valuing a debt, and the question of bad or doubtful debts was never considered. If a seller makes an agreement to take, in lieu of a debt, payment by instalments with interest and security, there is no rule that you must value the mortgage or negotiable instrument. The balance due from purchasers of houses in respect of unpaid purchase money should be included in the computation of the appellant's profits or gains as debts at their face value. For this purpose it does not matter whether the price is to be paid forthwith or at the end of twenty years or by instalments over that period, nor whether interest is payable or not. When a trader makes a sale he records in his books, not a promise to pay for the goods, but the amount of the debt. No trader thinks that, in computing his profits or gains, he must find what would be the value of his debts to a dealer in debts. The conception of the sale of a debt is quite different from the conception of a sale of goods as between vendor and purchaser. When consideration is payable in kind and is a marketable thing it must be valued to arrive at its price, but when a price is fixed and part of it is the subject of a debt, that debt must be set down at its face value. The intention of drawing up

(1) (1922) 8 Tax Cas. 265.
(2) (1941) 23 Tax Cas. 749.
(3) [1937] A. C. 91.
(4) [1937] A. C., 91 185.

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accounts is to show the true result of the year's trading. There is no rule that debts which are in respect of contracts executed during the year of assessment, but not payable within that year, are to be excluded from the accounts of that year any more than there is a rule that expenses in respect of such contracts, but not payable within that year, are to be so excluded. Thus, a trader who bought stock or materials would enter the price of them in the year's accounts even though payment was not due in that year. To do otherwise would give a false impression of the year's trading: see *J. P. Hall & Co., Ld.* v. *Inland Revenue Commissioners* (1); *Isaac Holder & Sons, Ld.* v. *Inland Revenue Commissioners* (2); *Newcastle Breweries* v. *Inland Revenue Commissioners* (3); *Jesse Robinson & Sons* v. *Inland Revenue Commissioners* (4); and *Jackson* v. *British Mexican Petroleum Co., Ld.* (5). There is no extra-legal practice of the Inland Revenue from which it must be inferred that the principle and practice contended for in this case are unworkable or unfair. An allowance for bad or doubtful debts is sanctioned by r. 3 (i.). These trade debts are debts within the meaning of the rule, and there is no justification for excluding them from its operation. A deduction in respect of a bad or doubtful debt should be made in arriving at the profits of the year, in which year normally it is written off, or a reserve created for it in the taxpayer's books. The decision in *Gleaner Co., Ld.* v. *Assessment Committee of Jamaica* (6) is not to be regarded as affecting the adoption for United Kingdom income tax purposes of the ordinary commercial practice. Where a deduction for a bad or doubtful debt has been made and the taxpayer subsequently recovers the debt or an amount in excess of its written down value, the amount recovered or the excess should, following ordinary commercial practice, be brought into credit in the year of recovery. It is in accordance with the Income Tax Acts to make allowances for bad debts in years subsequent to that in which the original debt was incurred. The practice is justified by r. 3 (i.) and in *Anderton & Halstead, Ld.* v. *Birrell* (7) it was not questioned. [They referred to *Ex parte Kemp. In re Fastnedge* (8); *Edward Collins & Sons, Ld.* v.

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(1) [1921] 3 K. B. 152.

(2) (1924) 12 Tax Cas. 768.

(3) (1927) 96 L. J. (K. B.) 735; 12 Tax Cas. 927.

(4) (1929) 12 Tax Cas. 1241.

(5) (1931) 16 Tax Cas. 570.

(6) [1922] 2 A. C. 169, 170, 172, 174.

(7) [1932] 1 K. B. 271.

(8) (1874) L. R. 9 Ch. 383.

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Inland Revenue Commissioners (1); *Whimster* v. *Inland Revenue Commissioners* (2); *Gray* v. *Lord Penrhyn* (3); *Sun Insurance Office* v. *Clark* (4); *St. Lucia Usines and Estates Co., Ld.* v. *Colonial Treasurer of St. Lucia* (5); *Reid's Brewery Co., Ld.* v. *Male* (6); *Rownson Drew & Clydesdale, Ld.* v. *Inland Revenue Commissioners* (7); *Frodingham Ironstone Mines, Ld.* v. *Stewart* (8); *Ensign Shipping Co., Ld.* v. *Inland Revenue Commissioners* (9); and *English Dairies, Ld.* v. *Phillips* (10).]

King K.C. in reply. On its facts the present case is very special. It is the only case raising the question how to compute profits or gains in such circumstances as these. In deciding what figure should be placed on the credit side in the year of sale, r. 3 (i.) gives no guidance. The subject-matter of the rule is a debt, the due payment of which can be related to the facts existing at the end of the year of sale. Those facts govern the question whether the debt is good, bad, or doubtful. The rule operates only when the imminence of the payment in relation to the accounting period is such as to permit the creditor to estimate the category into which the debt falls. At the end of the year of sale the appellant cannot form any such estimate in regard to an instalment due from one of the purchasers fifteen or twenty years hence. Since the rule cannot operate here the debt should be valued, taking into account the factors: (1.) its present worth, and (2.) the risk of the instalments not being met or the security proving insufficient. No authority goes the length of laying down that the full purchase price must be credited in the accounts of the year of sale regardless of the fact that the payment is to be made over a very long period.

The House took time for consideration.

May 19. Viscount Simon L.C. My Lords, the question in this case is as to the proper method by which to compute under sch. D, para. 1 (a), of the Income Tax Act, 1918, the annual profits or gains arising or accruing to a speculative builder. The question at issue is whether the profits and gains arising or accruing from his trade have been correctly

(1) (1924) 12 Tax Cas. 773, 779.
(2) (1925) 12 Tax Cas. 813.
(3) (1937) 157 L. T. 164; 21 Tax Cas. 252.
(4) [1912] A. C. 443.
(5) [1924] A. C. 508, 512.
(6) [1891] 2 Q. B. 1.
(7) (1931) 16 Tax Cas. 595.
(8) (1932) 16 Tax Cas. 728.
(9) (1928) 139 L. T. 111; 12 Tax Cas. 1169.
(10) (1927) 11 Tax Cas. 597.

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calculated so far as the 65*l.* covered by the second mortgage in the case of James Mayhew is concerned. The Crown contends that the amounts owing to the appellant, secured by second mortgages or promissory notes, are debts of his trade, the amount of which must be brought into account, except in so far as a deduction is permissible in respect of bad or doubtful debts under the provisions of r. 3 (i.) of the rules applicable to cases I and II of sch. D. The appellant keeps his accounts on the basis of the calendar year, and, consequently, his assessment of income tax for the fiscal year ending April 5, 1935, is based on the figures of his trade for the calendar year 1933. The argument for the Crown is that, since he sold the house in question in March, 1933, he must bring into his account for income tax purposes for the year 1934–5 the whole purchase price of 425*l.*, notwithstanding that 65*l.* of it was not due and payable in 1933 and would only be paid off gradually, so that, if the terms of the second mortgage were duly observed, some twenty-two years would elapse before it was finally discharged. The appellant, on the other hand, contends that the sums receivable under the second mortgage fall to be valued at the time of the sale of the houses at their actual value at that time and not at their face value. A second contention urged on behalf of the appellant went further and urged that such part of the price as was not paid or payable within the year 1933 ought not to be included on the profit side of the account for that year at all, but would fall to be included in the later year or years in which they were paid or became payable. It was, of course, a corollary of this last proposition that there should be included in the calculation of profits and gains for the year 1933 instalments paid or due to be paid in the course of that year in connexion with the sales of houses previous to that year. The case stated includes the information that the appellant retired from his business of a speculative builder on December 31, 1937. It is easy, therefore, to see the importance to him of securing a decision that what remained to be paid to him after that date does not properly come within the calculation of income tax on his business profits, but there remains to be decided the question what is the right mode of estimating the annual profits of his trade.

I have come to the conclusion that neither of the contentions put forward on behalf of the appellant ought to succeed. When a trader in the course of his trade makes a sale to a purchaser, whether the subject-matter of the sale be a house or any other asset in which he deals, his accounts for the year in which the transaction takes place should for income tax purposes normally include, on the one side, the cost of providing the asset with which he has parted to the purchaser, and, on the other side, the price for the asset which the purchaser has paid or bound himself to pay. The figure to be entered on the credit side is ordinarily the full price and its face value. If at the end of the year the taxpayer can satisfy the commissioners that such portion of the debt as has not actually been paid is a bad or doubtful debt, an adjustment under r. 3 (i.) of the rules applicable to cases I and II may be obtained, though, presumably, this sort of adjustment is more likely to arise at a later stage, but from the point of view of the trader the relevant time is the time when he parts with his asset to the purchaser, and, if the accounts are to set out correctly his profits and gains, the whole consideration must be brought in at that stage, notwithstanding that a portion of it will not be payable until later while carrying interest in the meantime. If the transaction took the unusual form of a sale in return for a payment, in whole or in part, of a lump sum in the future, with no interest in the meantime, I should be quite prepared to agree that the debt representing the true price required to be arrived at by taking the present value of the lump sum which is payable in futuro, but when the unpaid lump sum (as is usually the case) carries a commercial rate of interest until payment, it is the lump sum itself which enters into the calculation of the price. The decision of this House in *Harrison* v. *John Cronk & Sons, Ld.* (1) is distinguishable. In that case there was no question of debt due from the purchaser of the house, and the issue lay between the builder and the building society. This is, I believe, the recognized practice of accountants in dealing with returns for income tax, and is the method for which the Crown contends. It corresponds to the business sense of the transaction. The appellant here, in the course of selling the house, becomes entitled to 65*l.* which will be due to be paid him in the future. In the meantime, he is charging his debtor interest and holds security. The position is, therefore, indistinguishable in a business sense from what it would be if the purchaser had paid him the 65*l.* down and he had then lent the 65*l.* back again to the purchaser on second mortgage

(1) [1937] A. C. 185.

at a suitable rate of interest. So analysed, the transaction is obviously one in which the 65*l*. should be treated as coming into the profit side of his account at the time of the sale of the house, while the interest paid on it will, of course, be liable to tax on each occasion that it is received.

As this appeal has been very fully and ably argued on both sides I do not wish to leave it without making an observation on r. 3 (i.), which provides that, in computing the amount of the profits and gains to be charged, no sum shall be deducted in respect of " any debt except bad debts " proved to be such to the satisfaction of the commissioners " and doubtful debts to the extent that they are respectively " estimated to be bad." It is clear from the words used in the beginning of the rule that it is concerned with prohibiting various claims for deduction from profits, and has nothing to do directly with declaring what are profits, yet I cannot help suspecting that it must be sometimes rather hastily read as though it amounted to an assertion that trade debts are profits. The true view is that in cases like the present, profits (or losses), so far as due to the particular transaction, arise from the sale and at the time of the sale. The debt representing the price is created by the sale and at the time of the sale. Indeed, the second reason of the case for the Crown is that debts due to the appellant from the purchases of houses " were debts within the meaning of r. 3 (i.)." If that were so, the only result would be that such debts necessarily enter into the calculation of profits. To my way of thinking, the reason why debts such as the 65*l*. in this case are to be brought in on the credit side of the account is because they are an element in arriving at the appellant's profits and gains, and not because of anything stated in r. 3 (i.) at all. There is a further reflection on r. 3 (i.) which it seems appropriate to put on record at the end of the present appeal. At one time in the course of the argument it was suggested that the right to make a deduction for bad or doubtful debts in years subsequent to the year of the transaction creating the debt was conceded only by the benevolent practice of the revenue, but it seems to me that the revenue's practice in this respect is due, not to benevolence, but to statutory law. If in the year when a house has been sold the whole price of the house has been included in the calculation of the vendor's trade profits and if in a later year it is ascertained that part of the price which still remains to be paid is of doubtful value or is a bad debt, the allowance made by the revenue is authorized and required by statute, notwithstanding that the year of sale has passed by. It will be adjusted by an allowance in the later year in which its unsoundness is proved. The judgment of the Judicial Committee, delivered by Lord Buckmaster, in *Gleaner Co., Ld.* v. *Assessment Committee of Jamaica* (1) may appear to be inconsistent with this view, but the Privy Council was there pronouncing on the income tax law of Jamaica which is not in quite the same terms as our own, and, in so far as this is not an adequate distinction, I must say that I find myself, with all respect to the learned former Lord Chancellor who prepared the judgment, unable to accept the proposition there laid down and think that the case should not be followed. I would dismiss the appeal.

LORD ATKIN (read by LORD THANKERTON). My Lords, the problem raised by this case can be stated simply, but its solution evidently affords ground for difference. The issue is whether the marginal sums agreed to be paid to the builder over a period of years ought to be assessed on him for income tax in the year of the contract as profits of his trade for that year at the full face value of the sum agreed to be paid or whether some other, and, if so, what, assessment should be made. The commissioners, Macnaghten J. and the majority of the Court of Appeal have decided that the builder is subject to assessment on the full sum agreed to be paid. With all respect to them, this appears to me to be giving an extremely unnatural, and, indeed, unjust, meaning to profits of the year, and I think that the decision cannot stand. I have the less reluctance in differing from the decisions appealed against because they are all based on a view of an income tax rule, r. 3 (i.) of the rules applicable to cases I and II of sch. D which, I believe, all your Lordships are agreed will not bear the construction put on it. The rule is: "3. In computing "the amount of the profits or gains to be charged no sum "shall be deducted in respect of (i.) Any debts except bad "debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are "respectively estimated to be bad. In the case of the bankruptcy or insolvency of a debtor the amount which may "reasonably be expected to be received on any such debt "shall be deemed to be the value thereof."

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(1) [1922] 2 A. C. 169.

It was contended by the Crown that the effect of this rule was that all debts, at any rate all "trade debts," must be brought into account at their face value subject to such deductions as were permissible under the rule for bad and doubtful debts, and this construction has been adopted by all the tribunals before whom this appeal came. It appears to have been overlooked that the rule does not purport to state what debts are to be brought into account, but deals only with deductions which may be made from debts that were brought into account. What debts are to be brought into account and at what value the rule does not say. No one doubts that in ordinary commercial practice where goods are sold on terms of ordinary commercial credit, three or six months or even more, traders are in the habit of treating the debt so created as part of the profits of the year in which the debt is incurred. Thus, where the business accounts are made up at the end of the calendar year, a sale in December on credit terms which expire in March or April will be regarded as a profit made in December, and this commercial practice is treated by taxpayers and tax collectors alike as involving a just and accurate computation of profits. The obligations so incurred in ordinary trading are treated as firm obligations and as good as cash in hand, and no one is any the worse. If expectations are disappointed, an allowance for a bad debt can be claimed and will be granted, but when one leaves the realm of ordinary commercial credits and has to deal with credits extending over many years the whole situation is changed. According to the Crown's contention it makes no difference whether the price of goods is to be paid forthwith or at the end of twenty years or by instalments over twenty years, and whether with interest or not, nor, apparently, is the possibility or probability of the debtor being unable to continue the payments over the whole period a matter to be taken into account. To my mind, to treat money to be paid twenty years hence as producing a profit this year equal to money in fact paid this year is to produce a completely unreal conception of yearly profit, and I venture to think quite foreign to any commercial ideas on the subject. It will be observed that the suggested rule does not even contemplate the allowance of discount. To style the obligation a trade debt, which it is, does not meet the difficulty. Nor, with great respect, is it conclusive to say that the creation of the debt is the consideration for the delivery of the goods. It is, but the question is still whether the consideration produces a profit in the year in which the purchase is made, and there are some conditions in which that proposition cannot be true, as, for instance, a promise in return for goods to render services over a period of years, or to give in exchange other commodities in a future year or years.

It seems to me, therefore, in the present case unreasonable to treat the whole sum payable over twenty years as amounting to a profit of the whole face value made in the year of sale. I am, of course, dealing only with the balance of the price. The part of the instalments that are allocated to interest do not come into the calculation. I agree that a sum payable by instalments at interest and fully secured either on mortgage of property or by the obligation of a debtor whose credit is beyond question as a bank or large insurance company might well be taken at its face value, for that would be the value of the obligation created. On the other hand, a sum payable without interest either in a lump sum several years ahead or by instalments could never be equivalent to its face value in the year of origin. Similarly, an obligation created as in the present case by members of the working classes whose ability to pay depends on continuity of employment and continuance of health and life and is further burdened by an obligation to pay much larger sums in reduction of the mortgage to the building society would very improbably be equivalent to the face value. This is plainly indicated by the figures in the accounts exhibited to the case which appear to indicate in general terms an annual deficiency of bad debts in respect of these marginal payments of over twenty per cent.

It is said, however, that these are not real difficulties. The taxpayer has for years prepared his accounts on the footing of entering the whole of the marginal payments at their face value and the uncertainty of the payments is satisfactorily met by the allowances made in subsequent years for bad debts. There seems to have been some doubt on both sides whether these allowances in subsequent years are in accordance with law, doubts which are reflected in the judgments in the Court of Appeal. The doubts are due to a decision in the Privy Council in *Gleaner Co., Ld.* v. *Assessment Committee of Jamaica* (1). I will discuss this case later, but I wish now to state that I entertain no doubt that allowances for bad debts made in subsequent years are legal, and that what has been described

(1) [1922] 2 A. C. 169.

as the normal practice of the inland revenue in such cases is correct. The practice, however, of the taxpayer, acquiescing in the claim of the inland revenue, is of little value when the practice is sought to be put on a legal footing. As long as a business is continued and income tax rates are fairly constant, it matters little to the taxpayer how his profit is computed, the allowances in future years will remedy the excessive assessment in the first year, but when rates begin to rise, or, particularly, as in the present case where the taxpayer is retiring from business, the position becomes at once unsatisfactory. It appears to be conceded that once the creditor has gone out of business no further allowances can be made, and thus the excessive assessment of the first year can no longer be compensated. I can see no reason why such an arbitrary method of computing profit leading to real hardship should be adopted when there is no statutory enactment prescribing it. I am satisfied, therefore, that the assessment which has been confirmed by the courts cannot stand.

There are more methods than one of calculating the profit in such cases as the present, and it may be that more than one may have to be adopted. For my part, I think that the most satisfactory course would be to put the debts at their face value on the one side and to open a suspense account on the other side which, no doubt, would be calculated on the ordinary risk of bad debts and adjust it year by year in accordance with the actual payments made. It is said that this is forbidden by r. 3 (i.). On the other hand, if that rule only applies, as I think it does, to debts that are correctly entered at their face value, its provisions would have no bearing on debts which could only be entered at their face value if some such corrective as a suspense account is necessary. Another method which is correct enough in theory is to value the debt. It would thus be treated as an asset received in part discharge of the price and its value would be calculated according to the experience of the business. I see no reason why the valuation should not be made of each debt as would appear to be the effect of r. 3 (i.) "to the extent that they "are *respectively* estimated to be bad." Valuation is certainly a rough method of adjusting profit, for there seems no means of subsequent correction by actual results, but, at any rate, it removes the anomalies that arise otherwise on a discontinuance of business.

Another and more accurate method so long as the business continues is that which I understand is preferred by my noble and learned friend, Lord Russell of Killowen, which is to enter only in each year the instalments actually paid, or, at any rate, payable. The difficulty as it appears to me is that when the creditor retires from business according to present accepted practice income tax would no longer be chargeable on instalments received after that date. I venture myself to doubt whether this practice is correct. The proceeds would be annual gains, and they would be due to carrying on a trade though not in the year of assessment. It is difficult to see how they would differ from instalments received in the second or third year while business is still being carried on. I can express no final opinion about this for it has not been argued, but I should like to consider it an open point. However, there is, I think, no doubt about the practice, and I think, therefore, that, as the case must go back to the commissioners, it will be sufficient to leave it to them to settle the right method of adjusting the assessment, feeling that the method of valuation affords least scope for legal doubt, and that, in default of satisfactory valuation being possible, they may have to fall back on the method of taxing instalments in each year as they fall due.

As I have said, I have arrived at this result while accepting the view put before us by the Crown, as I understand in the present case for the first time in this House, that it is in accordance with the Income Tax Acts to make allowances for bad debts in years subsequent to that in which the original debt was incurred. The authority to the contrary is the judgment in *Gleaner Co., Ld.* v. *Assessment Committee of Jamaica* (1). That case is a decision on the Income Tax Act of Jamaica, but the wording so closely resembles the English Act from which no doubt it was borrowed that it is, to my mind, impossible to distinguish it. The decision clearly lays down that allowances granted under the words of r. 3 (i.) can only be made in the original assessment. Notwithstanding the unfeigned respect I have for the learned lord who delivered the opinion of the Privy Council I cannot but remember that occasionally "dormitat Homerus." I see no reason for such a restriction which appears to defeat almost any beneficial effect of the power to render such an allowance. It is often, I should have thought usually, the case that the need for allowance becomes obvious, not in the year the debt was

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(1) [1922] 2 A. C. 169.

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incurred, for if doubt arose then presumably the debt would not be created, but at a later period. I am satisfied that the practice of the inland revenue coincides with commercial needs, and I am driven to say that, in my opinion, the case of *Gleaner* (1) was wrongly decided and should not be treated as an authority in English income tax law.

For these reasons, I am of opinion that this appeal should be allowed, and the case should be remitted to the Special Commissioners for the assessments to be varied in accordance with the opinion expressed in this House. The appellant should have his costs of his appeal before the Special Commissioners in the courts below and in this House.

LORD THANKERTON. My Lords, I agree with the opinion of my noble and learned friend, Lord Atkin, except that, like my noble and learned friend, Lord Russell of Killowen, I find it unnecessary to come to any final conclusion as to the statutory validity of the Crown practice to make allowances for bad debts in years subsequent to that in which the original debt was incurred. There is no question of any such allowance in the present case, and—without further consideration—I am not prepared to hold that the opinion expressed in the Privy Council in *Gleaner Co., Ld.* v. *Assessment Committee of Jamaica* (1), is not applicable to the English Acts, or is wrong. With reference to the two cases referred to by my noble and learned friend, Lord Porter, I would only note that in *Anderton & Halstead, Ld.* v. *Birrell* (2), the allowances were made by agreement, and no such question was raised, much less decided, while in *Reid's Brewery Co., Ld.* v. *Male* (3), it was only by holding that the brewers carried on banking and moneylending as a branch of their business that the court found the deductions permissible. I agree with the motion proposed by my noble and learned friend, Lord Atkin.

LORD RUSSELL OF KILLOWEN (read by LORD THANKERTON). My Lords, this is a very special case. It is the case of the business or trade carried on by a person, who is commonly called a speculative builder, i.e., one who buys land and enters into agreements to build houses on parcels thereof for persons who are not prepared, in return for a conveyance to them of the house and land, to find more than a small proportion

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(1) [1922] 2 A. C. 169.
(2) [1932] 1 K. B. 271.
(3) [1891] 2 Q. B. 1.

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of the purchase money. I need not state the methods adopted by the appellant or the part played in the transactions by the building society. That has already been done, and the details appear in the two cases selected before us as typical, viz., Mayhew and Hearnden. It is sufficient for my purpose to state that in no case did his bargain with the purchaser entitle the appellant to receive the full purchase money in the year in which he sold and conveyed to the purchaser the house and land. Indeed, the bargain bound him to wait for many years before the final instalment became due. The instalments payable by the purchaser consisted partly of principal and partly of interest, but, if the purchaser made default in payment of any instalment, the whole amount of the purchase money still unpaid became immediately due.

The Crown contends that, in computing the full amount of the profits or gains of the appellant's trade of the year preceding the year of assessment, the balance due from purchasers of houses and land conveyed to them in that year in respect of unpaid purchase money should be included as debts at their face value, notwithstanding the long credit given which entitled the purchasers to pay by instalments extending over many years. In the Crown's case before this House this inclusion is stated (curiously enough) to be in accordance with r. 3 (i.) of the rules applicable to cases I and II of sch. D, a rule which relates only to deductions in respect of debts, not to their inclusion. That rule per se does not justify the Crown's contention, nor does any inference which could legitimately be drawn from the rule. The matter is, however, in my opinion, decided adversely to the Crown by the decision of this House in *Harrison* v. *John Cronk & Sons, Ld.* (1). It is true that the facts in that case differed from the facts in this case. In *Cronk's* case (1) the portion of the purchase money withheld from the vendor was withheld by the building society and might not (in whole or in part) ultimately reach the vendor if the purchaser came in default to the building society. In the present case part of the purchase money is withheld from the vendor by the purchaser, and may not (in whole or in part) ultimately reach the vendor if the purchaser comes in default to him, but in each case the question is the same, viz., whether the amount withheld should be brought into the account on the receipt side at its face value. The Court of Appeal held that the amounts were to be brought

(1) [1937] A. C. 185.

in as trading receipts at the time of each sale, not at their face value, but on a proper valuation. We affirmed that decision, but added (in view I think of a difficulty which had been anticipated by the commissioners in making a valuation) that, in the event of the commissioners finding a valuation impracticable, they should not be treated as receipts of trade except in so far as such sums or any part thereof were released to the company (i.e., received by the vendors) during the trading periods in question. That authority seems to me inconsistent with the contention that the amount of outstanding purchase money should be brought in at its face value.

For myself, I think that "the annual profits or gains "arising or accruing" to the appellant from his trade in any one year would be most truly computed by including on the credit side of the account his actual cash receipts during that year and so much of the outstanding purchase moneys as fell due to be paid in that year, i.e., treating the latter on the footing of receipts in that year. If and so far as they could properly be deemed bad or doubtful, deductions would be made under the before-mentioned r. 3 (i.). If, by reason of default, the whole of the outstanding purchase moneys had become due, the whole amount would be entered as falling due in that year with the appropriate deduction under the rule. This method is, in effect, the alternative suggested by this House in *Cronk's* case (1) in the event of valuation being found to be impracticable.

Some of your Lordships, however, are of opinion that the proper course to adopt is to value the debts which represent the outstanding portions of purchase money which will be received in subsequent years when and if the successive instalments (which are composed in part of unpaid purchase money and in part of interest) are duly paid. I am not disposed to disagree. It must, however, be borne in mind that this valuation is in no sense a discounting for the purpose of arriving at a present value of a future payment, for the debt is carrying interest until payment. Nor is it a deduction in respect of a bad or doubtful debt under r. 3 (i.), for (there being no existing default) there would be no ground for alleging that the debt was either bad or doubtful. Had any default already occurred the whole of the outstanding purchase moneys would have become due, and would be

(1) [1937] A. C. 185.

entered as a debt immediately payable, with the appropriate deduction under the rule. No need for valuation in that case would arise. The valuation which I contemplate is one which takes into account all the risks which a creditor runs who (like the appellant in this case) gives very long credit on doubtful security and which may at some future time convert a presently good debt into a bad one. In assisting the commissioners to arrive at such a valuation, I can see no objection to evidence being given to show that, in the experience of the appellant in his trade and of others who carry on the same kind of trade, a certain percentage of these future instalments proves to be irrecoverable. I would, accordingly, allow the appeal and send the case back to the commissioners for them to make a valuation and to alter the assessments accordingly.

I have not found it necessary to express any views on the true construction of r. 3 (i.), or on the legality of the practice which was described by Scott L.J. in his judgment as extra-legal. As at present advised, I do not think that the rule permits a deduction, in computing the profits of a subsequent year, of a debt treated as good in computing the profits of a previous year, and that the practice referred to is a concession to the taxpayer, not a right on his part, but I prefer to keep these points open until the necessity for their decision arises.

LORD PORTER. My Lords, the facts in this case have been fully stated and I need not repeat them. No doubt, the habit of building and selling houses to purchasers who obtain part of the purchase price from building societies while for the remainder they continue to be debtors direct to the building owner with or without security is of recent origin. Nevertheless, it is now widespread, and its effect in a form not identical with, but similar to, that adopted in the present case has already been the subject of a revenue appeal in your Lordships' House. That, in the normal course of affairs, it will become even more common is, I think, likely. Your Lordships' decision is, therefore, of importance, not only in law, but also in fact, to a considerable number of tax-payers who will be affected by it. I make these observations because it has been suggested that this is an exceptional case, and will have little, if any, effect on the liability to tax of building owners or other business men. Debts so incurred and credits so obtained are, no doubt, an extension of the type of debit and credit customary when income tax was originally imposed, but the same language continued to be employed when and after that tax was reimposed though the content of the word "debt" was being extended to meet changing conditions. In spite, therefore, of the forcible judgment of Scott L.J. based on a historical survey of the conditions originally obtaining, I cannot but believe that the sums owing to the owner by the purchaser are debts as generally understood among business men and by accountants at the present time, and come within the express words of r. 3 (i.) of the rules applicable to cases I and II of sch. D as set out in the Income Tax Acts.

In the Court of Appeal it appears to have been assumed that, in calculating the profits of a business, debts, whether presently payable or not, must be brought into account on the credit side at their face value because they are debts, unless, indeed, they can be shown to be bad or doubtful. Rule 3 (i.) seems to have been considered to imply that they must be so treated because a provision as to what deductions are allowable in the case of a debt necessarily implies that it is to be taken into account at its face value save in so far as those deductions are allowable. My Lords, I do not think that this contention can be accepted in that form. Debts, no doubt, if payable within the year of charge and possibly those not so payable provided they are payable within a reasonable time thereafter must be taken into account, and when they are taken into account r. 3 (i.) prescribes what deductions are allowable, but it does not follow that all debts must be taken into account either in the year in which they are contracted or at their face value. What has to be ascertained are the profits and gains of the business, or, as the wording originally stood, the balance of profits and gains—a difference in language which does not affect the meaning of the provision. To ascertain that balance one has to determine what sums are to be credited and what debited in the annual accounts. No directions are given in the Income Tax Acts as to how those profits are to be ascertained, and, in default of direction, they must, I think, be arrived at on ordinary commercial principles, subject to such provisions of the Income Tax Acts as require a departure from such ordinary principles: see per Lord Clyde (Lord President) in *Dailuaine-Talisker Distilleries* v. *Inland Revenue Commis-*

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sioners (1), and *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2). As Mr. Konstam says in the latest (1943) edition of his book on The Law of Income Tax, at p. 100: "Speaking generally "the profits of a trade are usually computed for purposes of "sch. D on an 'earnings' basis . . . . Amounts "receivable under contracts entered into in the year are "credited and allowance is made for bad debts." So considered, it must, I think, be conceded that at the present time debts, whether payable at once or in the future, would normally be treated as an asset of the business in the year in which they were contracted. Rule 3 (i.) appears so to assume, but they are treated as credits, not primarily by reason of the rule, but because business practice follows that course. Indeed, this seems to be the natural course to follow in circumstances such as those under consideration, since, on the sale and transfer of each house, the owner has parted with an asset and received in exchange a payment from the building society together with a debt due from the purchaser which is secured by a second mortgage with or without a promissory note in addition. I find it difficult to think that these items are not to be brought into account as soon as the transaction is completed or to accept the view that they must wait until each instalment is paid before they are credited. They are present assets though payable at intervals in the future. Indeed, Mr. King did not, save in the last resort, argue to the contrary. His first and main submission on behalf of the appellant was that they should be taken into account in the year in which the several houses were sold, but at a valuation, and in support of this argument he relied on your Lordships' decision in *Harrison* v. *John Cronk & Sons, Ld.* (3).

If, then, the debts are to be brought into account in the year in which the various houses are parted with, it has to be determined what value is to be put on those debts and whether they are to be assumed to have their face value, or are to be valued otherwise, and, if so, on what basis. That in some cases they may not have their face value must, I think, be conceded. Indeed, I understand that the representatives of the Crown eventually did not dissent from this view. A simple illustration may be taken. A. and B. agree that a debt of (say) 15,000*l*., which the one owes to the other, shall be settled twenty years hence by means of one payment of 25,000*l*. In such a case the present value of the 25,000*l*. may reasonably be taken to be 15,000*l*. and I see no reason for treating the asset as being worth 25,000*l*. at the moment when the bargain is made. Clearly, it has no such real value. The position, however, of a debt payable in the future which bears interest meanwhile is another matter. The parties are free to arrange what interest will recompense the lender for the delay in payment and prima facie what they arrange does represent the proper payment for that delay. It might, no doubt, be shown that it is only nominally arranged for that purpose and that in reality it is too large or too small, but such cases must be rare and as a rule it is a true evaluation of the amount to be paid in return for the postponement. There may be a number of reasons for valuing a debt at less than its face value, and were it not for r. 3 (i.) I should regard the proper course in cases like the present to be to write down the value of the individual debt in accordance with the many risks of its not being paid which so long a postponement and so unsubstantial a debtor would involve. But though other eventualities may be taken into account in ascertaining the value of a debt, r. 3 (i.), in forbidding an allowance to be made for anything other than bad or doubtful debts to the extent to which they are estimated to be bad, does, I think, imply that badness or doubtfulness, which is not actually existent, at the time the estimate had to be made, but is then only a future possibility, should not be taken into consideration. Any delay in payment is made up for by the agreed interest, and for the moment it cannot be said that any of the debts in issue are or can presently be estimated to be bad or doubtful. Indeed, it has not been suggested that any allowance should be made in the present case on those grounds and except for the delay I know of no contingency other than that the debts may at some time become bad or doubtful which would call for a reduction. *Cronk's* case (1) dealt with a different set of circumstances. In it no debt remained due from the purchaser to the owner. The full price was paid to the latter by the building society, but, lest the society should not be repaid by the purchaser, in full, the owner deposited a sum of money with it and guaranteed payment of an additional sum beyond the deposit. In these circumstances there were contingent liabilities on each side—in the case of the society to return the deposit or some part

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(1) 1930 S. C. 878.

(2) [1915] A. C. 433.

(3) [1937] A. C. 185.

(1) [1937] A. C. 185.

of it if the money which was recovered from the purchaser enabled this to be done ; on the side of the owner to implement his guarantee if the purchaser failed to pay even so much as with the deposit made up the full price. The amount of the liability on either side was not an ascertainable figure and could at best be estimated and perhaps only guessed. In these circumstances your Lordships decided that, if it could be estimated, the liability of the building society should be brought into account in the year in which it was incurred, but, if it could not be estimated, any sum found to be due from the society to the owner must be treated as an asset in the year in which it was ultimately paid. In such a case there was no debt either present or future due to the appellant. It might eventually happen that something would be found to be due to him, but, on the other hand, so far from receiving, he might have to pay. I do not see how such a contingent liability could be treated as having its largest possible value when it might have none, and that not because the liability was a debt and was bad or doubtful, but because there might be no liability at all. *John Emery & Sons* v. *Inland Revenue Commissioners* (1), on which the appellant also relied, did not bring in issue any question of the value of a debt. There was no personal obligation in that case, only a ground annual, i.e., a perpetual annuity of a fixed sum secured on property. Such an annuity was not money, but was money's worth, had an ascertainable value in cash, and was, in your Lordships' view, to be taken into account at that value. Neither case seems to me to throw much light on the question which your Lordships have to consider.

If the face value of a debt once taken were final, it might be said that an injustice had been done to the owner who would be accountable for the full value, and yet, if his experience (e.g., in the present case) was to be trusted, might lose as much as a third part of the debts which had been treated in his accounts as having their full face value. Your Lordships' attention, however, has been drawn to the practice in the past of the inland revenue authorities of making an allowance in respect of losses for bad or doubtful debts as and when they occur, though the debt itself was originally treated as being of its face value in a previous year's accounts. Such a practice necessitates, I think, the corresponding obligation on the part of the taxpayer to

(1) [1937] A. C. 91.

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submit in a later year to an increase in the sum at which a debt previously treated as bad or doubtful should be brought into account if, in fact, a payment greater than the assumed value had been obtained or seems likely to be obtained on a later occasion. In *Anderton & Halstead, Ld.* v. *Birrell* (1) a debt taken into account in a previous year was later permitted to be written down in two stages in two successive years. The decision in that case turned on a different point, viz., whether the debt could be treated as having been mistakenly valued at too low a figure in the years in which the value had been written down so that the profits of those years could be recalculated, the value written up, and the sum on which tax was payable, increased. The argument that it could be so treated was held to be unsound, but nothing was said to throw doubt on the right of the subject to have the value of a debt reduced at any time as and when it was discovered to be bad or doubtful, or of the Crown to have it increased in some future year if it proved to be of greater value than had been assumed in an earlier year when it was brought into account or valued. A course similar to that followed in *Anderton's case* (1) seems to have been adopted in *Reid's Brewery Co., Ld.* v. *Male* (2), and I know of no decision to the contrary which binds the courts of this country. In the submission of the Crown this practice is justified under the terms of r. 3 (i.). It has been argued, however, that the wording of this rule permits a deduction from the face value of a debt only in the year in which it is brought into account. Thereafter, it is said its value can no longer be altered. An opinion to this effect is to be found in *Gleaner Co., Ld.* v. *Assessment Committee of Jamaica* (3). That case depends on the wording of the Jamaica Income Tax Acts, and, though the language used is similar to the wording of the English Acts, yet the case itself being a decision of the Privy Council is not binding on your Lordships, and, in any case, the view expressed in it has always been regarded with some doubt so far as concerns this country: see Halsbury's Laws of England (Hailsham edition), Vol. 17, p. 162, note (*t*). Apart from that case I know of no reason for limiting the effect of the section to one year. In my view, the practice of the income tax authorities has statutory warrant, and the correct course to pursue in cases like the present is to treat the debt as good until it is

(1) [1932] 1 K. B. 271.
(2) [1891] 2 Q. B. 1.
(3) [1922] 2 A. C. 169.

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shown to be bad or doubtful, and when it is so shown to make an allowance in the year in which its diminution in value is thus justified.

Admittedly, so much of the sum as consists of interest must be separately accounted for as and when each portion becomes due. No doubt, if this course be followed and if a building owner goes out of business, he may suffer some hardship inasmuch as there is in that case no future year in which he can be given an allowance in cases where the debt proves bad or doubtful after his business activities have ceased. On the other hand, if a debt has been written down before he retires and is afterwards paid in full, he will receive a windfall in the shape of a payment which is subject to no tax. However that may be, I find myself in agreement with the noble Viscount on the woolsack, and would dismiss the appeal in the present case for the reasons set out above which are not dissimilar to, though not quite identical with, those which influenced the Court of Appeal.

Appeal allowed.

Solicitors for appellant: *Claude Barker & Partners.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

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April 18, 19, 20, 21, 24, 25, 26; *May* 24.

[HOUSE OF LORDS.]

REPRESENTATIVE BODY OF THE CHURCH IN WALES . . . . APPELLANTS;

AND

TITHE REDEMPTION COMMISSION AND OTHERS . . . . RESPONDENTS.

PLYMOUTH ESTATES, LIMITED . . APPELLANTS;

AND

SAME . . . . RESPONDENTS.

Ecclesiastical law—Church in Wales—Tithe rentcharge—Vesting in Commissioners of Church Temporalities in Wales—Former vesting in Ecclesiastical Commissioners for England—" Lay impropriator " —Liability to repair chancels—Welsh Church Act, 1914 (4 & 5 *Geo.* 5, *c.* 91), *s.* 28, *sub-s.* 1.

By s. 28 of the Welsh Church Act, 1914: " (1.) Nothing in this " Act shall affect any liability to pay tithe rentcharge, or the

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* *Present:* Viscount Simon L.C., Lord Macmillan, Lord Wright, Lord Porter and Lord Simonds.

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"liability of any lay impropriator of any tithe rentcharge to repair "any ecclesiastical building, but a county council shall not, by "reason of being entitled to or receiving any tithe rentcharge "under this Act, be liable for the repair of any ecclesiastical "building. (2.) Such liability as aforesaid of a lay impropriator "may be enforced in the temporal courts at the instance of the "representative body in like manner as if such liability arose under "a covenant made with the representative body and running with "the tithe rentcharge."

On the disestablishment of the Welsh Church certain tithe rentcharges, formerly vested in the Ecclesiastical Commissioners for England, became vested in the Commissioners of Church Temporalities in Wales, being ultimately transferable by them to the University of Wales by virtue of the provisions of the Welsh Church Acts, 1914 and 1919. A summons was taken out by the Tithe Redemption Commission to determine whether these tithe rentcharges were immediately before October 2, 1936 (the date under the Tithe Act, 1936, for the extinguishment of tithe rentcharge), vested in the Welsh Commissioners subject to or freed from the liability for the repair of chancels of churches to which they were subject or gave rise immediately before the vesting thereof in the Welsh Commissioners :—

Held, that the University of Wales, when it came to own the tithe rentcharge, which but for the Tithe Act, 1936, would have been transferable to it, would then have been a "lay "impropriator"; that, consequently, under the provisions of s. 28 of the Act of 1914, it would have been under the obligation of chancel repair; and that the Welsh Commissioners, while the tithe rentcharge was vested in them, were under a similar obligation.

Decision of the Court of Appeal (sub. nom. *Tithe Redemption Commission* v. *Commissioners of Church Temporalities in Wales* [1943] Ch. 183 reversed.

APPEAL from the Court of Appeal.

The facts stated by VISCOUNT SIMON L.C. were as follows :— The Welsh Church Acts, 1914 and 1919, provided for the disestablishment and partial disendowment of the Church in Wales, and the date of disestablishment was finally fixed at March 31, 1920. At that date every cathedral and ecclesiastical corporation of the Church in Wales, whether sole or aggregate, was dissolved, and by s. 3, sub-s. 1, of the Act of 1914 ecclesiastical courts and persons in Wales ceased to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales ceased to exist as law. The method by which the partial disendowment was to be carried out was to vest in the Commissioners of Church Temporalities in Wales (hereinafter called "the Welsh Commissioners")—a statutory body created by s. 10 of the Act of 1914 and originally intended to be dissolved at the end of 1917—as from the date of disestablishment all Welsh ecclesiastical property of every kind: s. 4 of the Act of 1914; and then to impose on the Welsh Commissioners the duty of distributing various types of property to their prescribed recipients—on the one hand, to the Representative Body of the Church in Wales (hereinafter called "the Representative "Body"), which represented the disestablished church, and, on the other hand, to two classes of lay recipients, the Welsh county councils and the University of Wales, according to the nature and incidents of the property taken from the Church. Broadly speaking, the Welsh Commissioners were, by s. 8, sub-s. 1, of the Act of 1914, to transfer to the newly-created Representative Body all churches and ecclesiastical residences, all restoration funds and property derived from Queen Anne's Bounty, and all private benefactions, which last were defined by s. 7, sub-s. 2, to include gifts and the like made to the Church in Wales since the year 1662. It appeared from s. 4, sub-s. 2, of the Welsh Church (Temporalities) Act, 1919, that among the property that might come to be transferred to the Representative Body was certain tithe rentcharge—presumably arising from private benefaction—but this was quite exceptional. The great bulk of tithe rentcharge in Wales, after vesting at disestablishment in the Welsh Commissioners, was to be transferred in due course either to the Welsh county councils or to the University of Wales according to the following rule. Out of the property not transferred to the Representative Body, the Welsh Commissioners were to "transfer "any tithe rentcharge which was formerly appropriated to the "use of any parochial benefice to the council of the county in "which the land out of which the tithe rentcharge issues is "situate": s. 8, sub-s. 1 (*c*), but tithe rentcharge which was not formerly appropriated to the use of any parochial benefice, but none the less vested in the Welsh Commissioners as from the date of disestablishment as being Welsh ecclesiastical property (such as was tithe rentcharge in Wales formerly owned by the Ecclesiastical Commissioners), was to be transferred by the commissioners to the University of Wales. In addition to the two varieties of tithe rentcharge mentioned above, there was also a third kind of tithe rentcharge the title to and devolution of which was not affected by the Welsh Church Acts at all. This was tithe rentcharge which had long ceased to belong to the Church and which at the time of the dissolution of the monasteries or later had by royal grant or

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otherwise come into the possession of lay owners. Generally speaking, down to the time of the disestablishment of the Church, an owner of any kind of tithe rentcharge in Wales was, in virtue of that ownership, under a personal obligation to maintain or to contribute to maintaining the chancel of the church from whose parish the tithe rentcharge was derived. The Tithe Act, 1936, extinguished all tithe rentcharge, whether in England or Wales, from October 2, 1936 (s. 1), and authorized the issue of tithe redemption stock for the compensation of the persons interested in a tithe rentcharge in respect of its extinguishment (s. 2). The Act created a body called the Tithe Redemption Commission to carry out the purposes of the Act, and by s. 31, sub-s. 2, it was provided that: "In respect of the "liability to repair arising from the ownership of a tithe "rentcharge extinguished by this Act in respect of which "stock is to be issued under this Act, the Diocesan Authority" (which in the case of Wales meant the Representative Body) "shall be entitled to receive a part of the stock to be issued in "respect of the rentcharge equal to such a sum . . . . as "may be reasonably sufficient, having regard to the condition "of the chancel or building at the appointed day, to provide "for the cost of future repairs thereof, and to provide a capital "sum the income of which will be sufficient to insure it against "destruction by fire." Where two or more owners of rentcharges were involved in the liability to repair the same building, the Act provided for the apportionment of the stock issuable to the Representative Body from the two or more sources (sch. VII).

By an originating summons, dated May 19, 1942, to which the Welsh Commissioners, the Representative Body, Plymouth Estates, Ld., and the University of Wales were defendants, the Tithe Redemption Commission asked: "(1.) That it may be "determined whether, upon the true construction of the Welsh "Church Acts, 1914 and 1919, the tithe rentcharges which "were formerly vested in the Ecclesiastical Commissioners "for England, and which, if the Tithe Act, 1936, had not been "passed would have been transferable to the University of "Wales under the Welsh Church Acts, 1914 and 1919, by the "defendants, the Commissioners of Church Temporalities in "Wales, became under the said Acts and were immediately "before October 2, 1936, vested in the said defendants, the "Commissioners of Church Temporalities in Wales:— "(*a*) subject to the liability for the repair of chancels of

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"churches to which they were subject or gave rise immediately "before the vesting thereof in the said defendants, or (*b*) freed "from the liability aforesaid. (2.) That the defendants, the "Plymouth Estates, Ld., may be appointed to represent lay "impropriators (within the meaning of s. 28 of the Welsh "Church Act, 1914), not parties to the action, of tithe rent-"charges payable in respect of lands in parishes which included "lands subject to tithe rentcharges of the nature specified in "para. 1 of this summons." The secretary of the Tithe Redemption Commission swore an affidavit setting out the facts relating to the parish of Llantwit Major in the county of Glamorgan: "The rectory of that parish had before the dis-"solution of the monasteries been appropriated and belonged "to the abbey of Tewkesbury. One part of the rectorial tithe "afterwards became vested in the Earl of Lincoln and the "other part in the Dean and Chapter of Gloucester. On "commutation in 1842 under the Tithe Acts, tithe rentcharges "amounting to 70*l.* were awarded to the trustees of Robert "Henry Clive and his wife, presumably the successors in title "to the Earl of Lincoln, and tithe rentcharges amounting to "481*l.* 7*s.* 11*d.* were awarded to the Dean and Chapter of "Gloucester and their lessees. These capitular tithe rent-"charges amounting to 481*l.* 7*s.* 11*d.* became vested in the "Ecclesiastical Commissioners for England and, by virtue of "the orders hereinbefore mentioned, were Welsh Ecclesiastical "property. The said tithe rentcharges amounting to 70*l.* "had prior to October 2, 1936, been reduced by redemption to "tithe rentcharges amounting to 64*l.* 4*s.* 2*d.* which were then "vested in the third-named defendants, the Plymouth "Estates, Ld., as lay impropriators." Bennett J. held that the Welsh Commissioners were not "lay impropriators" within s. 28, sub-s. 1, of the Welsh Church Act, 1914, and that, therefore, the tithe rentcharges in question were immediately before October 2, 1936, vested in them freed from the liability for chancel repair. The Court of Appeal (Lord Greene M.R., Luxmoore and Goddard L.JJ.) affirmed this decision. The Representative Body and Plymouth Estates, Ld., appealed to the House of Lords.

Sir Walter Monckton K.C., *R. Gwyn Rees* and *B. McKenna* for the appellants, the Representative Body of the Church in Wales. By reason of their ownership of the tithe rentcharge now in question (that which was transferable to the University of Wales), the Ecclesiastical Commissioners were liable for chancel repair and prima facie after the date of disestablishment the liability passed to the Welsh Commissioners where tithe rentcharge vested in them by virtue of the Welsh Church Acts. The onus of proof is on those seeking to displace that liability. The Ecclesiastical Commissioners and the Welsh Commissioners are "lay impropriators" within s. 28, sub-s. 1, of the Act of 1914, as the term was then understood, and, accordingly, that section alone is sufficient to preserve the liability to chancel repair in respect of the university tithe rentcharge. Unless the person holding tithe rentcharge is a spiritual person or a corporation having the cure of souls that person is a lay impropriator. This marks the distinction between "appropriation" and "impropriation." The former was the annexation of tithes to a spiritual person or a corporation of spiritual persons having the cure of souls, while the latter was the annexation of tithes to other persons. Before the dissolution of the monasteries tithes could only be owned by spiritual persons: see *Grendon* v. *Bishop of Lincoln* (1). The distinction between spiritual and lay ownership depends on the character and functions of the owner: see Phillimore on Ecclesiastical Law, 2nd ed., vol. I., pp. 219–20; vol. II, p. 1,588; Cripps on Church and Clergy, 8th ed., p. 95; Blackstone's Commentaries Book I, c. 18, 1st ed., p. 458; 11 Halsbury's Laws of England, 2nd ed., p. 844, para. 1,537, and the definition of "impropriate" in the Oxford English Dictionary. Neither the Ecclesiastical Commissioners nor the Welsh Commissioners are anything but lay impropriators in ordinary language. Where, as in the case of s. 28, sub-s. 1, the legislature preserves a liability imposed by the common law and by ecclesiastical law on the members of a certain class and also by the same Act adds another member to that class (in this case the Welsh Commissioners) there is no rule of construction which compels the court to hold that member exempt from the liability preserved in respect of the class. There is nothing in the wording of s. 28, sub-s. 1, to suggest that any transferee of tithe rentcharge under the Act is not included in the words "any lay impropriator." If the words do not go so far as to include any transferee, whether created by the Act or not, there can be no point in the express exemption of the county councils. Lord Greene M.R., in rejecting the appellants' argument, said (2) that it was unlikely

(1) (1575) Plow. 493, 495, 496. (2) [1943] Ch. 183, 191.

that the legislature intended the words of s. 28 to cover "conveyancing acrobatics of such a complicated and artificial "kind," but the intention of the section was to preserve the liability of lay impropriators and the plain words of the Act should not be cut down. The only difficulty is that the machinery applied to the unrealities of the transition may look fantastic. During the interval in which the tithe rentcharge vests in the Welsh Commissioners they are the legal owners and there is no reason to differentiate them from other owners of tithe rentcharge even though the property must ultimately go to the University of Wales. The ultimate recipients are also lay impropriators within s. 28 and as such subject to the liability to repair chancels. The construction of the Acts adopted by the Court of Appeal would involve the conclusion that the liability to chancel repair by a lay impropriator of rectorial property other than tithe rentcharge is abolished, although that liability is expressly preserved by s. 28 in the case of a lay impropriator of tithe rentcharge. Apart from these considerations, the liability to chancel repair was not part of " the ecclesiastical law of the Church in Wales " within the meaning of s. 3, sub-s. 1, of the Act of 1914, and, accordingly, was not abolished by that section. Tithe law was part of the general law of the land. The Tithe Act, 1891, gave the county courts jurisdiction with regard to the recovery of tithe rentcharge (s. 2). Till the Chancel Repairs Act, 1932, s. 1, the ecclesiastical courts had power to enforce the repair of chancels, but in s. 3 of the Act of 1914 " ecclesiastical law " is not used in a sense wide enough to cover the repair of chancels. The fact that the Act made no express provision for a tribunal to take the place of the spiritual court in enforcing chancel repair is not conclusive, for by s. 18 (*g*) of the Act of 1914 the liability " to repair any ecclesiastical building " was expressly kept alive. Perhaps the Attorney-General might have dealt with the matter as a public right. Part I of the Act deals with " disestablishment," that is the freeing of the Church in Wales from State control in doctrine, government and discipline. These properly came within the scope of ecclesiastical law: see Phillimore on Ecclesiastical Law, 2nd ed., vol. I, p. 10, and Sweet's Law Dictionary, p. 305. There is a recognized distinction between matters such as these and the question of the repair of chancels.

Wilfrid Hunt for the appellants, Plymouth Estates, Ld. The Welsh Church Acts on their true construction do not exclude the passing of the liability to chancel repair to the Welsh Commissioners. Even if, contrary to the appellant's submission, any provision taken by itself were capable of such a construction, that construction should not be adopted because it would involve casting the whole burden of the liability on lay impropriators in the position of Plymouth Estates, Ld., without any right of contribution, besides abolishing without compensation the right of contribution previously existing. " An intention to take away the property of a " subject without giving him a legal right to compensation for " the loss of it is not to be imputed to the legislature unless " that intention is expressed in unequivocal terms " : *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ld.* (1). Such was not the policy of the Acts for the Act of 1914 by s. 8, sub-s. 1 (iii.) preserved the endowments of the Church in Wales.

Rewcastle K.C. and *Beebee* for the respondents, the Commissioners of Church Temporalities in Wales and the University of Wales. The summons follows sch. VII to the Tithe Act, 1936 : see also s. 31, sub-ss. 2 and 3, of that Act. The practical question is whether under the Welsh Church Acts, 1914 and 1919, the tithe rentcharge which would have been transferable to the University of Wales, but which is still vested in the Welsh Commissioners, ceased before October 2, 1936, to be subject to chancel repair liability or not. The answer must depend on whether, by reason of s. 3 of the Act of 1914, under which the ecclesiastical law of the Church in Wales ceased to exist as law, the Welsh Commissioners never came under the liability to chancel repair or whether they are to be regarded as lay impropriators so that s. 3 does not apply to them and they are under chancel repair liability by reason of s. 28 of the Act. Liability to chancel repair was a creation of ecclesiastical law only, and was enforceable only in the ecclesiastical courts. Whatever is the full scope of the words " ecclesiastical law " in s. 3 of the Act of 1914, they cover that part of the law which dealt with the repair of chancels since that liability came directly out of it alone and in 1914 had never been dealt with by any other law. By s. 3 of the Chancel Repairs Act, 1932, the jurisdiction of ecclesiastical courts to enforce repair of chancels was transferred to the county courts. There is no authority to suggest that before that Act the liability was capable of being enforced otherwise than in the ecclesiastical courts. In those courts there was no means of obtaining any

(1) [1919] A. C. 744, 752.

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judgment for money. If a person received tithes and failed to discharge his liability to chancel repair he might be admonished on a cause of office that his soul might not be jeopardised, but, if he proved contumacious, such a process could not have produced either payment of money or the execution of work on the chancel. The liability was a personal one and did not depend on the amount of tithe received, nor was it a charge on it. Otherwise it could have been avoided by transferring the tithe rentcharge from one person to another with sufficient frequency. The person liable is the legal owner: see *Wickhambrook Parochial Church Council* v. *Croxford* (1). This liability, being rooted in ecclesiastical law, was destroyed by s. 3. Unless this was so, there would be no point in the saving affected by s. 28, for there was nothing else in the Act to call for such a provision. But for the terms of s. 28 it would be clear that the chancel repair liability of every holder of tithe rentcharge had disappeared. The meaning of the term "lay "impropriator" in s. 28 can only extend to cover persons and corporations other than the Ecclesiastical Commissioners, the Welsh Commissioners, the University of Wales and the county councils. The section, which is contained in part IV of this Act under the heading "Supplemental," is expressed to be a saving clause and on the true construction of the Act as a whole it must be taken to refer only to lay owners of tithe rentcharge as private property which at the date of disestablishment formed no part of the endowments of the Church in Wales. The property was, therefore, outside the scope of the Act, and, but for s. 28, the owners would have received fortuitous benefit from chancel repair liability in consequence of s. 3 which abolished ecclesiastical law in Wales. Accordingly, s. 28 can have no application to this case and the question of chancel repair liability does not arise. There were no lay impropriators before the dissolution of the monasteries when the Crown took some parts of church property and handed it over by Act of Parliament to divers persons as their private property for their private benefit. These were the first "lay impropriators" and the term was a term of art applicable to a particular field of ecclesiastical law. From the dissolution of the monasteries its meaning was quite definite and well recognized, indicating a person who had in his hands property which was formerly church property devoted to spiritual purposes and which was now his private property so that he was free to deal with it as he chose: see Phillimore on Ecclesiastical Law (2nd ed.), vol. I, p. 220. Ayliffe's Parergon, p. 90, indicates that only a limited number of persons and their successors in title are properly described as lay impropriators. That is the true test whether or not a person is a lay impropriator, and it does not really depend on whether or not the holder of tithe rentcharge is an ecclesiastical person or body. Otherwise there would be no reason for the provision in s. 38, sub-s. 4, of the Act of 1914. For a person to be a lay impropriator it is not necessary that he should be a layman, e.g., Archbishop Cranmer, was a lay impropriator of gifts of church property made to him for his own personal use, but the term "lay impropriator," having a normal intelligible meaning, should not be extended or strained in the Act. It is inapplicable to the Ecclesiastical Commissioners, for, when they came into possession of church property, it was not lost to the Church or diverted from it, but was transferred to them that it might be the more efficiently used for the purposes of the Church through part of its organization. Moreover, the term is only appropriate to a continuing lay impropriator, and in consequence of the Act, which took the property away from them, the Ecclesiastical Commissioners must in any event cease to be lay impropriators within the meaning of the Act. The Welsh Commissioners are not "lay impropriators." They derived no benefit from the property transferred to them which was not lost to the Church and it would be contrary to the policy of the Act to impose on them a liability such as this. The words used in s. 28, sub-s. 1, are "affect any liability." "Affect" means "make a "change in." Accordingly, the section cannot apply to a body created by the Act. In this connexion the test is, not whether a person or corporation came into possession of the tithe rentcharge after the passing of the Act, but whether it was in consequence of the Act. The University of Wales and the county councils cannot be lay impropriators, for they do receive the property, not for their own purposes, but to apply it as the Act directs to certain charitable and eleemosynary purposes. As regards the county councils, s. 28 is merely declaratory of what the position would have been without it. The mention of them was made ex abundanti cautela. In the circumstances in which the Act was passed, it was intended to make it perfectly clear to the county councils, which were bitterly opposed to performing any ecclesiastical functions, that they were not liable for chancel repair. As regards the

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(1) [1935] 2 K. B. 417.

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University of Wales, it would be strange if one class of lay impropriators, the county councils, were excluded from liability and at the same time, for no clear reason, the university, through the Welsh Commissioners, were left under that very liability. The matter is carried no further by ss. 4 and 8 of the Act of 1914. Under s. 4 there is no expression apt to impose the liability to chancel repair on the newly-constituted Welsh Commissioners. If the right of the Church to require such repairs be saved at all it is saved by s. 28.

W. F. Waite for the Tithe Redemption Commission.

Sir Walter Monckton K.C. in reply. Unquestionably, the University of Wales falls within the meaning of "lay "impropriator" in s. 28 by reason of the maxim expressio unius est exclusio alterius. The Welsh Commissioners are none the less "lay impropriators" because they owe their origin to this Act. The fact that they do not get the property for their own benefit is not relevant: see *Wickhambrook Parochial Church Council* v. *Croxford* (1).

The House took time for consideration.

May 24. VISCOUNT SIMON L.C. My Lords, the practical importance of the question raised by the originating summons is clear. The tithe rentcharge which was vested in the Welsh Commissioners with a view to its being transferred to the University of Wales has been extinguished. When the Tithe Redemption Commission determines the amount of stock to be issued for compensation in respect of the extinguishment of any such tithe rentcharge, are the Welsh Commissioners entitled to receive the whole of such stock with a view to transferring it to the University of Wales, or does there attach to the ownership of the tithe rentcharge which has been extinguished a liability to chancel repair, with the result that the Representative Body will be entitled to receive so much of the stock as is needed to provide for this repair hereafter, while only the residue of the stock goes to the Welsh Commissioners for transfer to the university? To determine this issue, it is necessary to look at the situation as it existed just before the extinguishment of the tithe rentcharge.

To illustrate the nature of the question to be determined, the secretary of the Tithe Redemption Commission swore an affidavit bringing to the notice of the court the facts relating to the parish of Llantwit Major in the county of Glamorgan.

(1) [1935] 2 K. B. 417.

Since the rentcharges belonging to the Dean and Chapter of Gloucester were not appropriated to the use of any ecclesiastical benefice, they were rentcharges of the kind which the Welsh Commissioners under the Act of 1914 were required to transfer to the University of Wales, and in this particular illustration the question is whether these tithe rentcharges, valued at 481*l.* 7*s.* 11*d.*, are, after the date of Welsh disestablishment, accompanied by a liability for chancel repair. Plymouth Estates, Ld., on the other hand, plainly and admittedly remain liable for chancel repair, for their tithe rentcharges, amounting to 64*l.* 4*s.* 2*d.*, are not Welsh ecclesiastical property and their situation is not altered by disendowment. Plymouth Estates, Ld., are, therefore, interested in this litigation because, if the decision of the courts below stands, they will have lost a previous contributor towards chancel repairs, and will be left as the only party against which a claim in respect of chancel repairs could be made. It is not necessary for the purposes of the present appeal to discuss the difficult question of the extent of their possible responsibility, or whether *Wickhambrook Parochial Church Council* v. *Croxford* (1) was rightly decided.

The section of the Welsh Church Act, 1914, on which, in my opinion, the matter chiefly turns is s. 28, which provides as follows: " (1.) Nothing in this Act shall affect any liability " to pay tithe rentcharge, or the liability of any lay impropriator " of any tithe rentcharge to repair any ecclesiastical building, " but a county council shall not, by reason of being entitled " to or receiving any tithe rentcharge under this Act, be liable " for the repair of any ecclesiastical building (2.) Such liability " as aforesaid of a lay impropriator may be enforced in the " temporal courts at the instance of the representative body in " like manner as if such liability arose under a covenant made " with the representative body and running with the tithe " rentcharge." The Court of Appeal have reached their decision on the view that " any lay impropriator " in this section does not include either a county council or the university to whom tithe rentcharge is transferred. Equally, in their view, the Welsh Commissioners themselves who were vested with tithe rentcharges are not lay impropriators. The argument is that, since ecclesiastical courts and ecclesiastical law ceased to exist as law as from the date of disestablishment, and since the Welsh Commissioners, as well as the county councils and the university

(1) [1935] 2 K. B. 417.

would not be affected by the covenant imposed on members of the Church in Wales under sub-s. 2 of s. 3, all liability for chancel repairs ceased in connexion with tithe rentcharge vested by the Act in the Welsh Commissioners. According to this view, owners of tithe rentcharge in the position of Plymouth Estates, Ld., are the only class of owners to be regarded as lay impropriators, and their liability is preserved by sub-s. 2 of s. 28.

I question the correctness of the view that liability for repair of a church in this country depended solely on ecclesiastical law such as was ended in Wales by s. 3 of the Act. Tindal C.J. points out in the elaborate judgment of the Exchequer Chamber in *Veley* v. *Burder* (1), with numerous citations of ancient authority, that it was by the common custom of England (that is, by the common law), that, in contrast with most of Christendom, the liability was divided. It anciently rested on the parishioners to repair the body of the church, but on the parson to repair the chancel. There is abundant ancient authority that the obligation of a rector to repair a chancel was an obligation imposed by common law, e.g., Comyns' Digest, Esglise G. 2; Coke, 2 Inst. 489; Ayliffe's Parergon 455. The enforcement of the obligation was usually in the spiritual courts, by process of monition, but *Nicholson* v. *Masters* (2) (cited in Burn's Ecclesiastical Law, vol. I, p. 414), seems to support the view that, if the churchwardens were put to the expense of doing the repairs, in case of default they could recover the amount as money paid in the temporal courts. It is not, however, necessary to pronounce finally on these niceties in order to reach a conclusion on this appeal. Even if s. 3, standing alone, had so wide an effect as the Court of Appeal assume, it still remains to construe and apply s. 28, which on that view operates as a restricting or saving clause.

Mr. Rewcastle contends that in this section the phrase "any "lay impropriator" does not include either the Welsh Commissioners themselves, in whom the tithe rentcharges are vested for purposes of redistribution, or either of the lay recipients to one or other of whom these rentcharges were to be transferred by the commissioners, viz., the county councils and the university. On this view the only persons covered by the phrase would be persons in the position of Plymouth Estates, Ld., i.e., owners of rentcharges, the title to which has not been affected or altered by the Act at all because such rentcharges before the passing of the Act were no part of Welsh ecclesiastical

(1) (1841) 12 A. & E. 265. (2) (1713) Unrep.

property. There is no definition of "lay impropriator" in the Act of 1914, and the only other place where the words are found in the Act is in s. 38, sub-s. 4, where, for removing doubts, it is "declared that the principal or other member of "Jesus College, Oxford, who may from time to time be rector "of Llandyssil, shall as such be treated as a lay impro-"priator and not as the holder of an ecclesiastical office."

We have, therefore, to ask ourselves (*a*) What does "lay "impropriator" in its ordinary sense mean ?, and (*b*) Is there anything in s. 28 which throws light on its meaning in that section ? As to (*a*) a lay impropriator in its ordinary sense is a lay person or corporation who is in possession of the revenues of a living: Ayliffe's Parergon, pp. 86, 90; Phillimore's Ecclesiastical Law, 2nd ed., vol. I, p. 220. There existed at one time some confusion between "appropriation" and "impropriation," but "appropriation," when that word is properly used, refers to the attachment of an ecclesiastical benefice to the perpetual use of some religious house, or Dean and Chapter, or other spiritual person. "Impropriation," on the other hand, is correctly used to refer to the transfer of the property of an ecclesiastical benefice into the hands of a layman, and to the possession by a layman of the property so transferred. Such was the nature of the ownership by a layman of a benefice transferred to him by royal grant or the like at the time of the Reformation. When the property in the incorporeal hereditament was acquired by the lay owner, he still remained, generally speaking, personally liable to maintain, or help to maintain, the chancel of the church of the parish from which the benefice was drawn. I cannot see by what right the phrase "lay impropriator" in s. 28 should be given so limited a meaning as is suggested. The county councils and the University of Wales alike acquire this species of property by force of the statute. The nature of the thing transferred and the obligations attached to its ownership do not alter because the mode of transfer is statutory. Indeed, in earlier times, I should suppose that there were a good many cases of Acts of Parliament which transferred such property from spiritual to lay hands. Confining myself, therefore, to the ordinary meaning of "lay impropriator," I should be led to the view that such a phrase would cover the county councils and the Welsh University in respect of their acquisition by statute of tithe rentcharge which formerly formed part of Welsh ecclesiastical property. The position of the Welsh

Commissioners I will consider later. As to (*b*) moreover, the language of s. 28 itself goes to indicate that the lay impropriator referred to is not limited to the kind of owner of which Plymouth Estates, Ld., is an example, for considered grammatically, the phrase beginning "but a county council," etc., plainly involves the assertion that a county council to whom tithe rentcharge is to be transferred under the Act is a lay impropriator. The section says that any lay impropriator is to be under the liability of chancel repair, and then goes on immediately to state the exception "but a county council "shall not by reason of being entitled to or receiving any tithe "rentcharge under this Act be liable for the repair of any "ecclesiastical building." I do not myself quite appreciate the force of the explanation offered in the Court of Appeal (1) that this reference to the county council was inserted "ex "abundanti cautela." The insertion of the exception enjoyed by county councils, which obviously limits the generality of what has gone before, is also of importance in helping to determine whether the university, in respect of the tithe rentcharge which it is entitled to receive, is not to be regarded as a lay impropriator. The section first asserts that any lay impropriator remains under the liability of chancel repair. It then goes on to state by way of exception that the county council, though "entitled to" or "receiving" tithe rentcharge under the Act, is not to be so liable, and, according to all ordinary principles of construction, it thus implies that the University of Wales, which is the other recipient of tithe rentcharge at the hands of the Welsh Commissioners, is a lay impropriator to whom the liability of chancel repair attaches. I, therefore, reach the conclusion that both the county council and the University of Wales are lay impropriators. The duty of the House is to interpret the section as it stands, and I must respectfully refuse to adopt an interpretation which seems to me not to follow the language which the legislature has chosen to employ.

I now come to the more difficult question whether the Welsh Commissioners should be regarded as "lay impropriators." In *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (2), the Court of Appeal, reversing Morton J., decided that the Welsh Church Commissioners, while there was vested in them tithe rentcharge which was transferable to county councils, were not on that

(1) [1943) Ch. 183, 195.

(2) [1940] Ch. 607.

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account liable for chancel repair. The actual conclusion in that case as above defined appears to be correct, and it is supported by observing that the exemption of county councils applies whether they are "entitled to" or are actually "receiving" tithe rentcharge under the Act, but I am not able to accept the width of reasoning adopted in the Court of Appeal's judgment in that case, according to which the same conclusion would be reached if the tithe rentcharge vested in the Welsh Commissioners was transferable to the University of Wales. It has to be remembered that the Welsh Church Commissioners are a statutory body with a limited life specially created to carry through the transfer of Welsh ecclesiastical property to its various recipients. The commission was originally intended to continue for three years and then to be dissolved. While the commissioners doubtless had the duty of managing the property vested in them until it was transferred their duties as managers must be discharged with due regard to the rights, interests and obligations of those who were going to benefit by the transferred property. While, therefore, in the case of tithe rentcharge to which the county councils were "entitled" the commission were not required to meet chancel repairs out of tithe rentcharge for the time being in their hands (and, indeed, would have been liable to the county councils for misapplication of the receipts if they had done so), the position is different as regards tithe rentcharge which is transferable to the University of Wales. As I have already said, the University of Wales when it owned the tithe rentcharge which was coming to it would be a "lay impropriator," and, in view of the language of s. 28, would be under the obligation of chancel repair. The Welsh Commissioners, while they have vested in them tithe rentcharge which is coming to the university, would be under a similar obligation. Whether in these circumstances the Welsh Commissioners (who, of course, enjoy no benefit from holding tithe rentcharge) should be regarded as lay impropriators or only as a statutory body with a duty to act in this matter as the university would properly act is largely a matter of words. If they neglected this duty it might well be that the chancel would fall into ruin and there would ultimately be imposed on the University of Wales a far more onerous liability than would arise if the repair was effected promptly. For these reasons I have reached the view that the question raised by the originating summons should be answered by saying that tithe rentcharges, which, but for the Tithe Act, 1936, would have been transferable to the University of Wales and which were immediately before October 2, 1936, vested in the Welsh Commissioners, were liable in the hands of the Welsh Commissioners for the repair of chancels of churches in the parishes where they arise. I move that the appeal be allowed.

LORD MACMILLAN. My Lords, I am so entirely in accord with the views which have been expressed by my noble and learned friend on the woolsack on the matters raised in this appeal that I need do no more than state my concurrence.

LORD WRIGHT. My Lords, I have read in print the opinion which has been delivered by the Lord Chancellor. I agree with it. I merely add a few observations to indicate the reasons which induce me to differ from the courts below. The arguments on the appeal have ranged over a wide field, and, no doubt, much discussion has been necessary to throw into relief the decisive question, which is whether the University of Wales is to be held to be subject to liability for chancel repairs in respect of the rentcharges transferable to it under the Welsh Church Acts, 1914 and 1919. As under the Tithe Act, 1936, all tithe rentcharges were extinguished and tithe redemption stock has been substituted for the rentcharges as on October 2, 1936, the practical problem is whether the redemption stock to be issued under the Act of 1936 to the Welsh Commissioners (as I shall describe the respondents, the Commissioners of Church Temporalities in Wales), so far as it represents tithe rentcharge transferable to the University of Wales should suffer a deduction in favour of the appellants, the Representative Body of the Church in Wales, of such an amount of the stock as would represent the commuted or capitalized value of the estimated future cost of chancel repairs. The Court of Appeal has held that the University of Wales, not being liable for the cost of chancel repairs, is not subject to have their amount of stock so reduced. The appellants, whose functions correspond to those of the Diocesan Board in England and represent the parishioners, appeal on the ground that the cost of repairing the chancel ought not to fall on them.

When the complications inevitable in a topic of this character have been examined and cleared away, the central problem presents itself in a comparatively simple form. That problem is, whether the Welsh Church Act, 1914, has changed the law in the respect that the owner of the tithes in question is thereby relieved from the liability to repair the chancel, which the custom of England, that is, the common law, has attached to the ownership of the tithe and that the ordinary meaning of " lay impropriator " does not apply to the owner of the tithes in question. The answer to these problems is to be found in s. 28 of the Act of 1914, read with the rest of the Act and in the light of established principles of law. The Court of Appeal has fully appreciated that the acid test is whether the Act of 1914 has in s. 28 given a special limited connotation to the words " lay impropriator." The Court of Appeal have given their reasons for thinking that it has. I am unable, with all respect, to accept the correctness of those reasons.

After the dissolution of the monasteries and the extensive distribution among lay rectors of the tithe formerly held by the monasteries, which were spiritual persons, a sharp distinction grew up between two words, " impropriations," which was the term properly applied where temporalities of the benefice were held in lay hands, and " appropriations," which was the term used in cases where the benefice was annexed to a spiritual corporation, sole or aggregate. In the former case the owners were generally called " lay impropriators," though the word " lay " was strictly otiose. The authorities cited by the Lord Chancellor, the list of which might be multiplied, sufficiently show that the repair of the chancel was imposed on the rector, and was so imposed by law. I venture to cite for both propositions an additional case, that of *Hawkins* v. *Rous* (1), in 7 Will. 3, where Holt C.J. laid it down that " by the civil " and canon law, the parson is obliged to repair the whole " church ; and 'tis so in all Christian kingdoms but in England ; " for 'tis by the peculiar law of this nation, that the parishioners " are charged with the repairs of the body of the church "— that is, excluding the chancel. Now, under the Act of 1914 the particular tithes in question, which were then vested in the Ecclesiastical Commissioners or Queen Anne's Bounty as lay impropriators because they are lay bodies, were to vest in the Welsh Commissioners until their final transfer to the university. All these bodies in turn would, in the ordinary use of language, be correctly described as lay impropriators and would prima facie be subject to the established liability to repair the chancel. Section 28, sub-s. 1, of the Act provides : " Nothing in this Act " shall affect any liability to pay tithe rentcharge, or the

(1) (1695) Carth. 360.

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"liability of any lay impropriator of any tithe rentcharge to "repair any ecclesiastical building, but a county council shall "not, by reason of being entitled to or receiving any tithe "rentcharge under this Act, be liable for the repair of any "ecclesiastical building." These words would cover the repair of the chancel. Unless the words "lay impropriator" in s. 28 can be twisted from their normal meaning so as not to cover the Welsh Commissioners if tithe owners or the University of Wales as ultimate owners, the language of s. 28, sub-s. 1, would seem conclusive to establish the liability of these bodies. But assurance is made doubly sure when the rest of the sub-section is considered—I mean the words introduced by "but." "But" would naturally be construed as introducing an exception from what would otherwise have been covered. The necessary implication of these words, as it seems to me, is that the county councils would, but for the exception, have been lay impropriators within the meaning of the section and as such would have been subject to the liability to repair the chancel, but are to be entitled to a special exemption which does not extend to the university. Its position is left to be governed by the general law which I have explained. The words introduced by "but" do, however, make it clear that the general provisions of sub-s. 1 of the section would, but for the exemption, have had the effect of imposing the liability on the councils in their character of lay impropriators. Apart from the express saving in favour of the councils, both the university and the councils would equally have been liable for the repairs. As the exception, which is limited to the councils, does not extend to the university, the latter is left with the unqualified liability.

The form of question proposed in the summons is framed so that it can be answered without considering the changes effected by the Act of 1936 which extinguished rentcharges and substituted for them the appropriate amounts of redemption stock. In my opinion, the answer to be made on the summons should be in the form proposed by the Lord Chancellor which is, in effect, that the university is subject to the liability and the appeal succeeds. The Court of Appeal arrived at the conclusion that the university was not so liable. In their earlier decision in *Commissioners of Church Temporalities in Wales* v. *Representative Body of the Church in Wales* (1), they had held that the councils were not liable. I agree with their decision in that case, but not with their reasons. In any case they failed to notice the difference under s. 28 between the positions of the councils and of the university. Though the court admitted (1) that, according to the ordinary use of words, "lay impropriator" in s. 28 would include both the Ecclesiastical Commissioners, and, therefore, presumably, the Welsh Commissioners, the university and the county councils, the opinion of the court was that the special context of the Act of 1914 necessitated a different conclusion. The reference to county councils in s. 28 was explained as having been inserted ex abundanti cautela. It was further said (2) that so important a provision would not appear in a part of the Act headed "Supplemental." The court particularly relied on its view that s. 3 of the Act had abolished the whole of the ecclesiastical law of the church in Wales as law, and also had abolished ecclesiastical courts in Wales. In effect, the Court of Appeal limit the term "lay impropriator" to the class of lay persons like the appellants, Plymouth Estates, Ld., who, by purchase or inheritance or otherwise, have become possessed of rentcharges which are outside the scope of the Act because s. 4 does not apply to them as not being church property.

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(1) [1940] Ch. 607.

There is no definition in the Act of "lay impropriator." The words must, I think, prima facie receive their ordinary connotation. They are only used in one other place in the Act, that is in s. 38, sub-s. 4, but there, I think, they are used in their ordinary sense. I am not clear as to the precise effect of the very general words of s. 3, if it applies at all to an incorporeal hereditament like tithes, a well-known type of real property, but I am clear, for the reasons given earlier in this opinion, that the rules relating to tithes as an incorporeal hereditament are not part of ecclesiastical law, but are part of the common law, though it is true that proceedings for their enforcement were left, in the first instance at least, to the ecclesiastical courts. The King's Bench, however, would always intervene on grounds of law to control by writ of prohibition or the like the proceedings of the ecclesiastical courts, as the authorities show. It is not, I think, and cannot be, suggested that the existence of tithe rentcharges was abolished by the Act of 1914, and there is no provision in the Act, except in the particular case of county councils, to vary the established rules as to the liability to repair the chancel. On the other hand, what has happened in this case shows the

(1) [1943] Ch. 183, 195. (2) Ibid. 193.

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wisdom of the legislature in putting in plain words the rights and liabilities which are expressly saved in s. 28 and in providing in sub-s. 2 a convenient procedure for their enforcement. The section was also necessary to introduce the special exception applying to county councils, which deals with both the intervening period between the vesting of the tithe rentcharge in the Welsh Commissioners and their eventual transfer to the county councils. That point was expressly dealt with in the case of county councils by the words in s. 28, sub-s. 1, "being entitled to or receiving any tithe rentcharge," which seem to distinguish between the temporary period of transition and the final transfer to the councils. There is no similar mention in reference to the university, but its liability is left to the general law. The Welsh Commissioners were, indeed, a statutory body of temporary existence created for the special defined purpose, but, though it is not necessary to decide finally, I think they were owners pro tempore of the rentcharges during that period which was more prolonged than was anticipated. I find it difficult to think that an incorporeal hereditament like tithe could be left without an owner even for a time. The language of s. 4 expressly speaks of the property vesting, and s. 8 uses similar language. My own opinion is that during the period before final transfer under s. 8 the Welsh Commissioners were legal owners of the property, the councils and the university respectively being beneficial owners. The duty of the commissioners would thus be in the meanwhile to manage the property in the interest of the beneficial owners, with due regard to the latters' liabilities or immunities, distinguishing for instance between the position of the councils which were freed from liability for repairs and the university which was not exempted. Without, however, further discussing these and other interesting contentions I am content to rest my conclusion on what I think is the true construction of s. 28. I would allow the appeal.

LORD PORTER. My Lords, if it were not that this House has formed an opinion different from that entertained by the Court of Appeal, I should not think it necessary to express a view of my own, but should be content to adopt that of your Lordships. As it is, I think I can express my opinion shortly.

The decision depends primarily on the construction of ss. 3 and 4 of the Welsh Church Act, 1914 (as modified by the Welsh Church (Temporalities) Act, 1919) and of s. 28

of the earlier Act. The matter in dispute concerns the liability or non-liability of the University of Wales, to shoulder the burden of repairing the chancels of certain churches in Wales, a burden formerly imposed on the holders of tithe rentcharges destined by the Act of 1914 to the university. The question is to some extent complicated by the passing of the Tithe Act, 1936, but that problem is best dealt with at a later stage.

The change of ownership of the tithe rentcharge in question is the result of the passing of the Welsh Church Act, 1914, which, by s. 1, disestablished the Church of Wales, and by s. 3, sub-s. 1, abolished the jurisdiction of all ecclesiastical courts and persons in Wales and Monmouthshire and enacted that the ecclesiastical law of that Church should " cease to exist as " law." Section 28 dealt with the obligations of continuing to pay tithe rentcharge and of lay impropriators to repair ecclesiastical buildings. Your Lordships have already had placed before you the various sections of all three Acts which are germane to the determination of the matters which require your decision. Like the Lord Chancellor, I do not desire to dogmatize as to the effect of s. 3, but for the purposes of the present dispute I am willing to assume that its provisions would, if they stood alone, abolish any remedy previously existing in a case where the holder of a tithe rentcharge failed to discharge the duty imposed upon him as holder of repairing the chancel of a church. But that section does not stand alone. It is qualified by the terms of s. 28, which keep alive the liability of the lay impropriator of any tithe rentcharge to repair and provide means for enforcing that liability in the temporal courts as if the liability arose under a covenant running with the tithe rentcharge. Prima facie, therefore, if the tithe rentcharge gets into the hands of a lay impropriator at any time it is held subject to the liability to repair. Necessarily, in these circumstances, much of the discussion before your Lordships turned on the meaning of the words " lay impro-" priator." The phrase is nowhere defined. It was urged that, in their inception, the words referred to a known body of persons to whom the tithe had been granted and who held it for their own benefit or as trustee for some private holder and that they had no reference to such bodies as the Ecclesiastical Commissioners, the Welsh Commissioners, the University of Wales or any county council. In support of this argument reliance was placed on the words of Ayliffe's Parergon at p. 90 :

"An impropriation, of which there are in England three "thousand eight hundred and forty-five, is properly so called, "when it is in the hands of a layman: and an appropriation is, "when it is in the hands of a bishop, college, religious house, "and the like." These words were said to show that only the three thousand eight hundred and forty-five lay persons and, of course, their successors in title, were properly so described, and were those intended to be referred to in s. 28 of the Welsh Church Act. This seems to be too narrow a view. The statement as to the number of lay impropriators is, I think, merely an enumeration of the members of that class in John Ayliffe's time, not a description of their quality. They are defined, as I conceive, in the statement that impropriation exists where the property is in lay hands, and this meaning is borne out by Ayliffe's statement on p. 89, when he says: "An "appropriation can only be made to a body politic, or corporate "spiritual, that has succession; and thereby that ecclesiastical "body is made perpetual incumbent of the benefice appropriated, and for ever shall enjoy all the glebe, tithes, and other "profits belonging thereunto, and has therewith the charge of "the souls belonging to the parish where the church appropriated is: upon which account it is, that an appropriation "regularly ought only to belong to a spiritual person, or (at "most) to aggregate bodies spiritual that consist of priests." Therefore, in deciding whether tithes are in the hands of a lay impropriator or not I think the question to be answered is not: Is the holder a successor of a known and limited number of persons? but is rather: Is the person, or is the body, an ecclesiastical person or body, or a non-ecclesiastical person or body? It was suggested that, if this be the question, there was no reason for providing in s. 38, sub-s. 4, of the Act that "the principal or other member of Jesus College, Oxford, "who may from time to time be rector of Llandyssil, shall "as such be treated as a lay impropriator." This provision, however, as I see it, is only inserted to deal with the difficulty that the principal or other member might at one time be a layman and at another an ecclesiastic, and, therefore, the Act provided that he should preserve the character of a layman in his capacity of rector, whatever his actual status might be.

I think Bennett J. and all the members of the Court of Appeal agreed that in its ordinary sense the term "lay "impropriator" would include at any rate a county council and the University of Wales, and I do not think they dissented from the view that in such a case the Ecclesiastical Commissioners and Welsh Church Commissioners would come within the same category. I have given reasons for supposing that this view is correct, and, contrary to the decision of the Court of Appeal, I see nothing in the Act to controvert it. Rather the reverse, but as I agree with the reasoning and opinion of the Lord Chancellor I need not elaborate this point. Even, however, if I thought that the meaning of " lay impropriator " was a matter of doubt or in other cases did not include such bodies as the Ecclesiastical Commissioners or the Welsh Church Commissioners, I should, like the Lord Chancellor and Lord Simonds, take the view that in this Act the Welsh Church Commissioners at any rate come within the class of lay impropriators as holding the property solely for the benefit of two lay bodies and as being under an obligation to transfer it to them at the appropriate time. On this point I have had an opportunity of reading, and would desire to adopt, the reasoning of Lord Simonds. The result of this view is that when the Tithe Act, 1936, came into force the Welsh Church Commissioners were and now are lay impropriators of and then held the tithe rentcharges transferred to them under the Welsh Church Act, 1914, which would have been transferable to the University of Wales, subject to the liability for the repair of chancels of churches to which they were subject or gave rise immediately before the vesting thereof in such commissioners. I would allow the appeal and declare accordingly.

LORD SIMONDS. My Lords, I concur in the motion that this appeal should be allowed and but for the fact that we are differing from the decision of the Court of Appeal I should not think it necessary to add anything to what has been already said. There are, however, two aspects of this case to which I wish to call attention. In the first place, I find it impossible to limit, as the Court of Appeal has limited, the effect of s. 28 of the Welsh Church Act, 1914. I do not think it necessary to determine the exact scope of that " ecclesiastical law of the " Church in Wales " which by s. 3, sub-s. 1, of the Act is to " cease to exist as law." The Court of Appeal has assumed that it includes the liability of the owner of the rectorial tithe to repair the chancel of the church of the parish out of which the tithe issues, and this assumption has, I think, largely influenced the interpretation which they have placed on s. 28. I share the doubts which have been expressed by your Lordships on the validity of this assumption in the light of the further researches that have been made into the history and nature of the liability, but, however this may be, I find myself constrained by the language of s. 28 to hold that for the purpose of this section the county council is regarded as a lay impropriator who would, but for the express exemption, be subject to the liability to repair. If the county council is to be so regarded, I cannot escape the conclusion that the University of Wales must be similarly regarded.

In the second place, I would add some brief observations on the position of the Welsh Commissioners. The passing of the Tithe Act, 1936, and the consequent necessity for the Tithe Redemption Commission to ascertain at a particular moment of time the existence and quantum of liability to repair arising from the ownership of a tithe rentcharge extinguished by the Act have brought into a somewhat artificial prominence the ownership of the Welsh Commissioners who are themselves a statutory body of an impermanent character. I cannot help thinking that, if no question of the issue of tithe redemption stock had ever arisen, but during the period of transition, in which the ownership of tithe was vested in the Welsh Commissioners, the question of repair to a particular chancel arose, the obvious solution would be found in the liability or freedom from liability of the beneficiaries to whom after that period of transition the tithe rentcharge would come. If that beneficiary were the county council, which takes free from liability, it would surely be a strange provision if the Welsh Commissioners during their period of management, long or short, were bound, or even at liberty, to embark on a work of repair which might in certain circumstances be of a substantial character. Equally, if the beneficiary were the University of Wales, which takes subject to the liability, it would be a strange thing if, during their period of management, the commissioners were not at liberty, and, indeed, as a matter of proper management, were not bound, to take the necessary measures of repair. In the repair of chancels as of other buildings the homely proverb that a stitch in time saves nine is effectively true. The Welsh Commissioners would, in my opinion, fall short of their duty of management if, by the neglect of proper repairs, they left a heavier burden to be borne by their ultimate beneficiary, the University of Wales. These considerations make it unnecessary to determine whether the Welsh Commissioners ought to be regarded as lay impropriators within s. 28, while

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the tithe rentcharges are vested in them. In my opinion, those rentcharges which would after their period of vesting in the Welsh Commissioners have been transferable to the University of Wales carried with them the burden of chancel repair throughout their journey to that destination and the question raised by the summons out of which this appeal arises should be answered accordingly.

The House ordered "that the question raised by the " originating summons should be answered by saying that, " upon the true construction of the Welsh Church Acts, 1914 " and 1919, the tithe rentcharges which were formerly vested " in the Ecclesiastical Commissioners for England and which, if " the Tithe Act, 1936, had not been passed would have been " transferable to the University of Wales under the Welsh " Church Acts, 1914 and 1919, by the defendants the " Commissioners of Church Temporalities in Wales, became " and were immediately before October 2, 1936, vested in the " said defendants the Commissioners of Church Temporalities " in Wales subject to the liability for the repair of chancels of " churches to which such rentcharges were subject immediately " before the vesting thereof in the defendants the Commissioners of Church Temporalities in Wales."

Appeal allowed.

Solicitors for Representative Body of the Church in Wales: *Milles, Jennings White & Foster.*

Solicitors for Plymouth Estates, Ld.: *Nicholl, Manisty, & Co.*

Solicitor for the Welsh Commissioners and the University of Wales: *R. Primrose.*

Solicitor for the Tithe Redemption Commission: *A. D. Stocks.*

J. C.*

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July 27.

PRIVY COUNCIL.

TROWER AND SONS, LIMITED . . APPELLANT;

AND

RIPSTEIN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Quebec—Jurisdiction—"Whole cause of action"—Code of Civil Procedure of the Province of Quebec, art. 27; *art.* 94 (3).

The words "the whole cause of action" in art. 94 (3) of the Code of Civil Procedure of the Province of Quebec, which provides that "in matters purely personal . . . the defendant may be "summoned before the court of the place where the whole cause "of action has arisen," mean all the material facts which must be proved to entitle the plaintiff in the action to recover. Accordingly, where the respondent's action against the appellant company, which had then no assets in the province of Quebec, no place of business or domicile there, and had not been personally served there, was brought in the Superior Court of the province, sitting in the District of Montreal, for, inter alia, an account, and was based on a contract which was made in London, England, the place of the making of the contract was an element in the definition of the whole cause of action, and since it, and certain other matters in connexion therewith, took place outside the city and district of Montreal the whole course of action did not arise there, and the Superior Court had no jurisdiction under the code to summon the appellant.

Article 27 of the code does not deal with service outside the jurisdiction. It is merely a general provision to show that aliens are not as such exempt in proper cases from the jurisdiction of the courts of the province.

Definition of "cause of action" in *Read* v. *Brown* (1888) 22 Q. B. D. 128, 131, and in *Cooke* v. *Gill* (1873) L. R. 8, C. P. 107, referred to.

Judgment of the Supreme Court of Canada [1942] S. C. R. (Can.) 107, reversed.

Appeal (No. 18 of 1942) from a judgment of the Supreme Court of Canada (February 3, 1942) whereby, by a majority of three judges (Rinfret, Crocket and Taschereau JJ.) to two (Davis and Hudson JJ.), an appeal of the present respondent was allowed from a judgment of the Court of King's Bench for the province of Quebec (Appeal Side) (February 28, 1940)

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whereby the judges of that court (Letourneau, Hall, Galipeault, Walsh and Barclay JJ.), unanimously affirmed a judgment of the Superior Court for the District of Montreal (March 15, 1939) whereby Décarie J. maintained a preliminary or declinatory exception made by the present appellant and dismissed the action brought by the respondent as against the appellant on the ground that the Superior Court did not have jurisdiction.

The following facts are taken from the judgment of the Judicial Committee. The appellant was a limited company, formed in 1929 under the English Companies Act. At the date of the commencement of the action it had no assets in the province of Quebec, and no place of business or domicile there. The action was brought against the appellant along with two other defendants, Gillespie and Redpath, who were described as carrying on business together as partners under the firm name of Redpath & Co., in the district of Montreal. Those two latter defendants were not parties to this appeal. In the action, which was instituted by writ of summons in the Superior Court of the province of Quebec in the district of Montreal, the respondent claimed a declaration that an agreement, as afterwards varied and extended, was a partnership agreement in existence from March 27, 1927, to March 27, 1937, and asked for an account and a partition of the assets of the partnership and, in default, a sum of $225,000 as representing the respondent's share in the partition. The declaration also claimed that there had been breaches of the agreement and incorrect accounting by the defendants. The respondent, on June 23, 1938, applied for an order that the appellant should be called through the newspapers on the ground that it had no known office or place of business in the city and district of Montreal nor in the province of Quebec, nor any officer or representative in the province. The order was made, and the appellant was duly called through the newspapers. The writ was not served personally on it. On August 23, 1938, it entered an appearance without prejudice, and on September 1, 1938, it moved by way of declinatory exception that the action should be dismissed as against it on various grounds, in particular, on the grounds that it was not domiciled in the district of the court, that the process had not been personally served on it, that the whole cause of action was not alleged to have arisen in the district, or elsewhere in the province, and did not in fact so arise and that no property of the appellant was alleged to be, or was in fact, situate in the district or province. Such was the substance of the main objections founded on in the declinatory exception when it came, after various amendments, before Décarie J. sitting as a judge of the Superior Court for the district of Montreal. The question in debate was whether the court had jurisdiction under the Code of Civil Procedure of the province of Quebec to summon the appellant. The Superior Court held that it had not, and its judgment was affirmed by the Court of King's Bench (Appeal Side) of the Province, but their decision was reversed by the Supreme Court of Canada by a majority, two judges dissenting. Hence the present appeal to His Majesty in Council.

The terms of the agreement on which the respondent's claim was based were to be found set out in a written document bearing date March 27, 1927, expressed to be made between a partnership firm of Trower & Sons, carrying on business as wine merchants in the city of London, and the defendant, Gillespie, and the respondent. In fact, as it had been found by Décarie J. and the Court of Appeal in Montreal, the actual agreement was made orally in London, between the partnership firm of Trower & Sons, the defendant, Gillespie, and the respondent, the two latter being represented by the defendant, Redpath. The written agreement, having been prepared in London and signed by the firm, was forwarded to Montreal, where it was signed by Gillespie and the respondent in or about August, 1927, but was dated back to March, 1927, from which date the parties had been doing business on its basis. The parties continued to do business on the terms of the agreement, but when the appellant company was formed in 1929 it acquired the rights of Trower & Sons, and thereafter it was treated as taking their place in regard to the agreement. By the terms of the agreement the firm were to open and maintain at their own expense an office in Montreal (the Canadian office, as it was called) for the sale of their goods, and were to appoint the defendant, Redpath, as manager of that office. The defendant, Gillespie, and the respondent were to use their best endeavours to introduce customers in Canada and the United States to the firm. They were to be paid commission on orders obtained by them, but customers' payments for goods sold were to be made direct to the firm's London office which was to remit each month the commission due to the Canadian office. That commission was to be divided in equal thirds between the firm, Gillespie and the respondent. The commission was to be net, all expenses of the Canadian office, all expenses in Canada and the United States being debited to the Canadian office, that was, to the firm or the appellant. At a later date the defendant, Redpath, was allotted a share of the commission, the shares of the other parties abating proportionately. It had not been suggested that, wherever the variation of the agreement was made, the circumstance affected the issue in the particular proceedings any more than the other variations of the agreement mentioned above.

The articles of the code which were particularly relied on in these proceedings as giving jurisdiction to the court to order service on the appellant were arts. 27, 94, 102 and 103 (1).

(1) By art. 27 of the Code of Civil Procedure of the Province of Quebec, "aliens, although not "resident in Lower Canada may "be sued in its courts for the fulfilment of obligations contracted "by them in foreign countries."

"94. In matters purely personal, other than those mentioned in arts. 96, 97, 98, 103 "and 104, the defendant may "be summoned :—1. Before the "court of his real domicile, or in "cases provided in art. 85 of the "Civil Code before the court of his "elected domicile ; 2. Before the "court of the place where the "action is personally served upon "him ; 3. Before the court of the "place where the whole cause of "action has arisen, or if it concerns a suit for libel published in "a newspaper, before the court of "any district in which such paper "is circulated, and in which the "plaintiff resides ; 4. Before the "court of the place where the "whole or part of his property is "situated, when he has left his "domicile in the Province, or has "never had such domicile but has "property therein and the cause "of action has not arisen therein. "5. Before the court of the place "where the contract was made. "In matters of contract by "agency or resulting from an "order given to or received by an "agent, mandatory or representative, the place where the contract was made is that where the "consent of the party, to whom "the thing forming the object of "the contract is deliverable, was "given, or that where the order "was given, to or received by the "said agent, mandatory or representative."

"102. In matters of succession "the parties are summoned before "the court of the place where the "succession devolves if it opens "in the Province ; otherwise "before that of the place where "the property is situated, or of "the domicile of the defendant or "any one of the defendants."

"103. In matters purely personal, if there are several defendants in the same action "residing in different districts "they may all be brought before "the court of the district in which "one of them has been summoned, "provided that such summons be "not made with the intention of "withdrawing the real parties "from the courts which would "otherwise have jurisdiction. In "real actions they must be summoned before the court of the "place where the object in dispute "is situated. In mixed actions, "before the court of the place "where the object in dispute is "situated, or before the court of "the domicile of one of the "defendants."

The trial judge held that the court had no jurisdiction under any of those articles. He held that the court had no jurisdiction under art. 94 (3.) as the whole cause of action had not arisen in Montreal; that the court had no jurisdiction under art. 94 (4.) as the appellant had no goods in the province; and that the court had no jurisdiction under art. 94 (5.) because the contract had been made orally in London. The appeal from his judgment was heard by five judges, who unanimously dismissed it. Their reasons for the decision were substantially in agreement. They all agreed that no one of the heads under art. 94 of the code applied. The court was not the court of the appellant's domicile, nor was it the court of the place where he was personally served, nor was it the court of the place where the whole cause of action had arisen, nor was it the court of the place where the whole or part of his property was situate, nor was it the court of the place where the contract was made. They held that art. 103 of the Code of Civil Procedure did not apply, and that art. 27 of the Civil Code was irrelevant. On appeal to the Supreme Court, the judgment of the majority, composed of Rinfret J. (now C.J.), Crocket J. and Taschereau J., was delivered by Rinfret J. The judgment was primarily based on the conclusion that the whole cause of action as constituted had arisen in the city and district of Montreal, and hence under art. 94 (3.) of the Code of Civil Procedure the respondent was entitled to bring his action in that court. It held that, whatever the nature of the agreement, the intention of the parties was that the whole business covered by it should be, as it was, carried on in and from the Canadian office in Montreal, even though the business had ramifications outside the district of Montreal and throughout the province of Quebec, Canada and the United States. The business, it said, and the transactions in the course of it, originated in the Canadian office in Montreal, whence the goods were shipped and invoiced to customers and where books, records and accounts were kept. As an accounting of that business and of those transactions was what the respondent prayed for in his action, it should be decided that the whole cause of his action had arisen in Montreal. Davis J., who with Hudson J. dissented, held that the whole cause of the action within art. 94 (3.) meant all the material facts which must be proved to entitle the plaintiff in the action to recover, and that all those facts must have arisen within the jurisdiction of the court. He held

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that in this case " the making or assuming of a contract by " the company, the receipt of payments by the company in " London from Canadian and American sales, the failure of " the company 'to remit' from London to Montreal certain " commissions on those sales, and probably other facts " necessary to establish the alleged cause of action, did not " arise within the jurisdiction of the Quebec Court " (1). He was for dismissing the appeal. Hudson J. was of the same opinion. He said that " the whole cause of action " referred to in art. 94 (3.) " must signify all of the facts, causes, moyens " and motifs alleged in the declaration, which, if traversed, " must be proven. This interpretation," he said, " has been " placed on the article by many decisions in the courts of " Quebec " (2). While he agreed with Rinfret J. that the place from where the services rendered by the plaintiff radiated was Montreal, which was also the place where the accounts were kept and where the eventual division of profits was to be made, he went on to observe that the contract itself was made in London, England, and moneys collected as a consequence of the respondent's work were collected by the appellant in London, and, though the respondent asked for an accounting in respect of business done at or through Montreal, yet he also asked for an accounting by the appellant in respect of all transactions under the agreement whether in Canada or the United States of America or England. He held, accordingly, that the whole cause of action could not be said to have arisen within the district of Montreal, and was for dismissing the appeal.

1944, May 22, 23, 24. *Valentine Holmes* and *Granville Slack* for the appellant. It was for the respondent to establish what he alleged in his declaration and then to prove the facts which gave the court jurisdiction. This was not a partnership, and calling it so was a mere attempt to found jurisdiction in Montreal. The words in art 94 (3.) are " the *whole* cause of " action," and the definition of those words given by the minority in the Supreme Court was right. In the words of Hudson J., the phrase " must signify all of the facts, causes, " moyens and motifs alleged in the declaration, which, if " traversed, must be proven " (3). According to the authorities that means every fact which the plaintiff must allege

(1) [1942] S. C. R. (Can.) 118.
(2) Ibid. 119.
(3) [1942] S. C. R. (Can.) 119.

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and prove before he can get the remedy he seeks: *Read* v. *Brown* (1). If the concurrent finding of fact of the Superior Court and the King's Bench Appeal Court—not dissented from in the Supreme Court—that the original agreement was made orally in England and later reduced to writing in Montreal be accepted it must be one of the facts which have to be proved to establish the cause of action. That is the strength of the appellant's case, and makes this a simple case. The agreement, it is submitted, was made in London, but the appellant has not to go as far as that, for the respondent has to prove that it was made in Montreal. Further, other things relevant to the cause of action, because they establish the reason for the respondent demanding an account, were done in America and in England.

W. D. Roberts and *Mortimer Weinfield* (of the Canadian Bar) for the respondent. The judgment of the Supreme Court of Canada is right as a correct interpretation of the effect of the Code of Civil Procedure on the facts and declarations considered, and is in accord with the established practice and procedure of the courts of the province of Quebec. The jurisdiction to summon a foreign corporation not domiciled in the district of Montreal and without assets there is in art. 103 of the code and the summoning of the appellant company was within that article: *Abitibi Power & Paper Co., Ld.* v. *Price Brothers & Co., Ld.* (2). The essential point of that decision was that as some of the defendants were within the district of Quebec others outside the district could be summoned. Here, the whole cause of action arose in Montreal. The phrase "whole "cause of action" means, every fact which, if traversed, the plaintiff has to prove to establish his right. The means of proof, the evidence, must not be confused with the cause of action. The breach of the agreement—the refusal by the defendant to accord to the plaintiff his rights—is the cause of action, not the facts which go to prove it. [Reference was made to *Ripstein* v. *Gillespie and others and Trower & Sons, Ld.* (3).]

Mortimer Weinfield followed.

Valentine Holmes replied.

July 27. The judgment of their Lordships was delivered by Lord Wright, who stated the facts, and continued: It

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(1) (1888) 22 Q. B. D. 128, 131.

(2) (1931) 52 Q. L. R., K. B., 10.

(3) (1940) 69 Q. L. R., K. B. 424.

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has been found, rightly, in their Lordships' judgment, by Décarie J. and the Court of Appeal in Montreal that the actual agreement was made orally in London. It is clear that the substitution of the appellant company for the firm of Trower & Sons must have involved a novation. The original agreement was changed in the sense that the parties were changed from some date in 1929. The evidence is defective because it does not show where that change was effected, since it is the changed or new agreement on which the action was brought against the appellant, at least in regard to matters since 1929, nor is there any allegation in the proceedings to show this. Whatever changes, however, were made, the original agreement still remained a necessary fact to be proved as part of the cause of action. The case has proceeded on the footing that the original agreement, which was made in London, continued until it terminated in March, 1937, after being extended until that date.

It is clear, in their Lordships' opinion, that the agreement did not constitute a partnership. The business was not carried on in common by the parties, but was the business first of the firm and later of the appellant. There was no sharing of profits and losses. The respondent and the defendant, Gillespie, were employees or agents of the firm or of the appellant. The share of net profit which they were to receive was their remuneration for the services which they rendered under the agreement. Their Lordships agree with the finding of both courts in Quebec that there was no partnership under the agreement. Davis J., in his dissenting judgment in the Supreme Court, also agreed. The majority in the Supreme Court did not find it necessary to decide the point. Their Lordships will proceed on the basis that no partnership was constituted under the Code of Civil Procedure of the province of Quebec, and need not further consider any arguments which are based on the assumption that there was a partnership.

With all respect to the three judges of the Supreme Court who formed the majority in that court, their Lordships are unable to concur in their decision despite the forcible reasoning in support of it expounded by Rinfret J. The question here is whether the court has power in the circumstances of this case to exercise jurisdiction over a person or corporation not personally served within it. If a party has been personally served within the jurisdiction, even though merely temporarily there, the jurisdiction of the court is generally established, but a court will not generally be entitled to assume jurisdiction over a person who is outside the jurisdiction and has not been formally served within it and who does not submit to the jurisdiction. If that power is to be exercised it must be given to the court by legislation. Thus, it was stated in *Berkley* v. *Thompson* (1) by Lord Selborne L.C.: "The general "principle of law is, 'actor sequitur forum rei'; not only "must there be a cause of action of which the tribunal can take "cognizance, but there must be a defendant subject to the "jurisdiction of that tribunal; and a person resident abroad, "still more, ordinarily resident and domiciled abroad, and not "brought by any special statute or legislation within the "jurisdiction, is prima facie not subject to the process of "a foreign court—he must be found within the jurisdiction "to be bound by it." If he is found within the jurisdiction of the court, and served there, he will generally be bound by the process. Equally he may be bound if he submits to the jurisdiction, but otherwise the court has no power unless it is expressly conferred on it. It is a question, not of practice, but of jurisdiction, whether the court has the power to serve a summons on a party resident abroad, so that the party may be brought within the jurisdiction of what is, to him, a foreign court. The exercise of the power involves the exercise of extra-territorial jurisdiction. In England the power depends on Or. 11 of the Rules of the Supreme Court, which have the force of a statute. In Quebec it is conferred by articles of the Code of Civil Procedure of the province. The court is strictly bound by the terms of these articles. It has no general power to proceed on what might be described as the "equity" of the articles. It cannot, because in the particular case before it it would be more convenient to apply some other rule than can be found on the true interpretation of the articles, depart from, or amplify, their meaning. It has no discretionary power to go outside the terms of the articles merely because in its opinion it would be the forum conveniens.

In the elaborate judgments of the judges of the Appeal Court of the province a careful examination was made of the terms of the relevant articles of the code, supported by a copious citation of authority. Their Lordships have examined these authorities, which seem to them amply to justify what the appeal judges said, in particular in respect of the sub-clauses of art. 94 which were principally relied on. When the appeal

(1) (1884) 10 App. Cas. 45, 49.

came before the Supreme Court the argument seems to have become concentrated for all practical purposes (as, indeed, it was before this Board) on art. 94 (3.), in which power is given to summon a defendant " before the court of the place where the " whole cause of action has arisen." Now, it is clear from the series of decisions cited in the Appeal Court that these words have been consistently construed according to their natural meaning which is well expressed in the language of Davis J. and of Hudson J. already quoted by their Lordships in this judgment. There is no strict parallel in English law to aid in the construction of this sub-article of the code, because Or. 11, which defines the power of allowing service out of the jurisdiction, does not contain the same phrase or impose the same condition, but the words, or analogous words, have been used to define the jurisdiction of some local courts. Thus, in *Read* v. *Brown* (1), the phrase to be construed was " a cause of " action arising in the city." That was defined as meaning " every fact which it would be necessary for the plaintiff to " prove, if traversed, in order to support his right to the " judgment of the court. It does not comprise every piece " of evidence which is necessary to prove each fact, but every " fact which is necessary to be proved." Such was the definition given by Lord Esher M.R. (2), which followed a similar decision given in *Cooke* v. *Gill* (3) and earlier decisions. As it is a question of jurisdiction, the court must be satisfied that the conditions which justify its exercise are satisfied. Lord Esher's definition agrees with the definitions given by Davis J. and Hudson J., which have already been cited, and with the definitions given by the judges in the appeal in Quebec. It also agrees with the definitions given by numerous judges in the authorities cited, in particular by Hall J., Walsh J. and Barclay J., in their judgments. In the judgment delivered by Rinfret J. their Lordships do not find any precise definition, but he seems to accept or approach one in his words " all the " essential facts which together gave rise to the action brought " by the appellant [that is, the then appellant, the present " respondent], or, in other words: the whole cause of his action " as constituted has arisen in the city and district of " Montreal " (4). The action, however, was based on a contract, and, in their Lordships' opinion, it is impossible to treat the place where the original contract was made as

(1) 22 Q. B. D. 128.
(2) Ibid. 131.
(3) (1873) L. R. 8 C. P. 107.
(4) [1942] S. C. R. (Can.) 114.

immaterial in the way that the learned judge does. It was, in their Lordships' view, an element in the definition of the whole cause of action. He does, indeed, enumerate a number of acts or things necessarily occurring in the course of the transactions which occurred in Montreal, but against this may be set the lists given by Davis J. and Hudson J. of matters which took place outside Montreal and which it was necessary to prove in order to establish the cause of action. The Supreme Court may have been influenced by considering that the action was for an accounting, and that as the books of the Canadian office and other material papers and accounts were kept in Montreal, Montreal was the more convenient forum, but, in their Lordships' opinion, even if that were so, it is not, as they have explained, the true test. It is not necessary again to refer to the many material elements in the conduct of the business which took place outside Montreal, and constituted part of the cause of action. Their Lordships, with all respect, are unable to concur with the views of the majority of the Supreme Court. In their judgment, the views of the minority of that court and of all the judges in the courts below were correct and should be affirmed.

Two other minor points only call for mention at this stage. One is in reference to art. 103 of the Code, which, as it then stood, Davis J. rightly construed as meaning by " districts," judicial districts within the province of Quebec. He rightly said it had no application to a person resident outside that province. Since then the article has been amended by the Quebec Legislature, by the Act 7 Geo. 6, c. 47, s. 5, and may sometime call for consideration in its new form. The other point is that art. 27 of the Civil Code is not dealing with service outside the jurisdiction. It is merely a general provision to show that aliens are not as such exempt in proper cases from the jurisdiction of the courts of the province.

On the whole case their Lordships are of opinion that the appeal should be allowed and the judgments of the Quebec courts restored. The respondent will pay the costs of the appeal and of the proceedings in the courts below. They will humbly so advise His Majesty.

Solicitors for appellant : *Simmons & Simmons.*
Solicitors for respondent : *J. M. Isaacs.*

Applied. BRITISH MOVIETONEWS *v.* LONDON AND DISTRICT CINEMAS [1951] 1 K. B. 190

DENNY, MOTT & DICKSON, LIMITED APPELLANTS;

AND

JAMES B. FRASER & COMPANY, LIMITED RESPONDENTS.

H. L. (Sc.)*

1944

Mar. 20, 21, 23; *May* 19.

Contract—Frustration—Trading agreement between timber merchants—Provision for letting one party's timber yard to other party—Option to lessee to purchase on termination of agreement—Dealing in timber rendered impossible by emergency legislation—Effect on option.

An agreement entered into in 1929 between the appellants and the respondents, who were timber merchants, narrated that it had been arranged between them that the respondents should purchase all their supplies of certain wood from the appellants and should let them a certain timber yard with an option to purchase it or take it on long lease on certain terms. The first four clauses of the agreement regulated the dealings in timber between the parties. Clause 5 provided for the termination of the agreement on notice given by either party. Clause 6 provided for the letting of the timber yard "to enable the foresaid trading agreement to be "carried out." Clause 8 gave the appellants, "in the event of the "foregoing trading agreement being terminated by either party as "aforesaid, . . . the right as at the date of the termination of "the said agreement" to purchase the timber yard at a certain price or to take a lease of it at a certain rent. In consequence of the Control of Timber (No. 4) Order, 1939, further transactions between the parties became impossible from the end of September, 1939, but the appellants continued to occupy the timber yard and in July, 1941, a letter was sent on their behalf to the respondents purporting to give notice to terminate the agreement and also of their intention to exercise the option of purchase:—

Held, that the agreement was not composite, but was a single contract, the main object of which was the trading; that the Control of Timber Order operated to frustrate the trading agreed on; and that, consequently, the option to purchase lapsed since it only arose in the event of the agreement being terminated by notice under cl. 5.

Decision of the Second Division of the Court of Session (sub. nom. *James B. Fraser & Co., Ld.* v. *Denny, Mott & Dickson, Ld.*), 1943, S.C. 293, affirmed.

APPEAL from the Court of Session.

The facts, stated by Viscount Simon L.C. and Lord Wright, were as follows: The respondents carried on business as timber merchants and saw millers and the appellants carried on business as timber merchants and importers. On July 10 and 25, 1929, the parties entered into a minute of agreement which narrated: "Whereas it has been arranged between the "parties that the [respondents] shall purchase all their supplies "of red and white pine wood from the [appellants] and that "the [respondents] shall let to the [appellants] the timber "yard at Grangemouth known as Drumalbyn Timber Yard "with an option to the [appellants] to purchase or take on "long lease the said timber yard upon certain terms "and conditions." By cl. 1: "The [respondents] shall be "bound and hereby bind themselves to buy from the "[appellants] all their supply of red and white pine wood "(except wood required for their case-making factories) and "the [appellants] shall be bound and hereby bind and oblige "themselves to supply the [respondents] with the said wood "so far as their stocks will permit and subject to all purchases "being of fair specification of lengths as imported. The said "wood shall be available to the [respondents] at the ground "at Drumalbyn Timber Yard, Grangemouth, or in the yard "of the [respondents] at Phœnix Saw Mills, Port Dundas, "Glasgow. . . ." Clause 2 fixed the price of the timber on a sliding scale based on the landed cost with an addition thereto of handling and other charges together with 2½ per cent. added to the total cost as guaranteed profit. Clause 3 regulated payment. Clause 4, after placing an obligation on the respondents to use their best endeavours to sell the wood, declared that they should have no control over the buying or selling of the appellants, that the contract should in no way limit the appellants' right to sell to others, and that nothing in the agreement should override or otherwise affect any arrangements entered or to be entered into by the appellants or any conditions imposed on them as to price or otherwise in regard to the purchase or disposal thereof. By Cl. 5: "This agreement shall commence as at May 28, "1929, and may be terminated at the instance of the "[appellants] by their giving at least 12 calendar months' "notice in writing by registered letter prior to the date on "which the termination shall take place, and the [respondents] "shall have the right to terminate the agreement at their "instance on giving 3 years' notice of termination in writing "by registered letter of the date on which the termination is "to take place." By cl. 6: "To enable the aforesaid "trading agreement to be carried out the [respondents] have

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"agreed to let to the [appellants] and the [appellants] have "agreed to take on let from the [respondents] the ground at "Fouldubs, Grangemouth, presently used as a timber yard "by the [respondents] and known as Drumalbyn Timber Yard . . . which let shall continue during the period of the "aforesaid trading agreement." By cl. 7: "In consideration "of the foresaid let the [appellants] shall not be bound to "pay any rent to the [respondents] but they shall be bound "to pay and free and relieve the [respondents] of" the annual feu-duty, the whole rates and taxes and all water, gas and other rates and all fire insurance. They were to keep all the buildings in good tenantable condition and repair and to have "the right to alter the railway line siding to suit their "trade and to lay additional line sidings." By cl. 8: "In the "event of the foregoing trading agreement being terminated "by either party as aforesaid the [appellants] shall have the "right as at the date of termination of said agreement to "purchase the said ground and all buildings and erections "thereon at a price of 4,000*l.* in exchange for which price the "[respondents] shall grant to the [appellants] or their nominees "a valid and marketable title and clear searches. Alternatively the [appellants] shall have the right to take on lease "from the [respondents] the said ground and buildings "and railway sidings thereon at an annual rent of 500*l.* per "annum . . ." By cl. 9: "It is understood that the lease "of the premises as above provided for shall be for a period "of 5 years from and after the date of the termination of the "trading agreement as aforesaid, and shall be renewable in "the option of the [appellants] for further periods of 5 years "from time to time thereafter up to a total of 99 years in all "from May 28, 1929." On the outbreak of war in September, 1939, the Control of Timber (No. 1) Order, made by the Minister of Supply by virtue of the Defence (General) Regulations, came into force restricting transactions in red and white pine wood of the type referred to in the agreement. One effect of the order was to render it unlawful for the appellants to supply the respondents with wood at the price stipulated in the agreement. The Control of Timber (No. 4) Order, 1939, which came into force on September 16, 1939, and later orders altogether prevented the import of timber as contemplated in the agreement. The appellants' stocks of timber were exhausted about the end of September, 1939, and from that date it was impossible to supply further timber to the respondents. In this action the appellants "admitted that the effect of the "government orders controlling transactions in timber was "wholly to prevent the current operation of the agreement "in so far as it related to the supply of timber by the "[appellants] to the [respondents]." On July 17, 1941, the appellants, by letter of that date, purported, under cl. 5 of the agreement, to terminate it by giving 12 calendar months' notice and to exercise at the same time the option under cl. 8 to purchase the timber yard at the agreed price of 4,000*l.* In an action brought by the respondents to determine the rights of the parties, the Lord Ordinary, Lord Robertson, held (1.) that the agreement was composite, comprising two distinct and severable parts, a "trading" and a "purchase" agreement; (2.) that the former had been terminated by frustration; but (3.) that the "purchase" agreement remained operative and that the option was validly exercised. The Second Division of the Court of Session (the Lord Justice Clerk, Lord Mackay, Lord Wark and Lord Jamieson) held that the effect of the orders was to render the trading illegal for an indefinite period and that qua trading the contract was frustrated. They further held (Lord Jamieson dissenting) that the agreement formed a single contract and had been terminated by frustration. The appellants appealed to the House of Lords.

C. Mackintosh K.C. (of the Scottish Bar) and *A. J. Hodgson* for the appellants. The contract was one and indivisible, but it had two quite separate objects, one of which, the trading object, may have been frustrated, but the other of which, the purchase of the timber yard, was not affected by circumstances arising out of the war. This is a composite contract and the purchase of the timber yard is as much a main object of it as the trading. The contract looks to the course of trading and also beyond the trading. The doctrine of frustration has no application where the supervening event is destructive only of some, and not of all, the objects or purposes of the contract, and in this case part of the contract survives and every part of it which can be performed must be performed. The provisions as to the sale of the timber yard were not in furtherance of the trading between the parties. On the contrary they were to take effect when the trading finished (see cl. 8 and 9). Also, by cl. 1, the appellants were entitled to deliver timber at the Phœnix Saw Mills, and, accordingly, the sale and purchase of the timber must be treated as independent of the terms dealing with the lease or sale of the timber yard. Whether a contract such as this remains alive when performance of part of it has become impossible is a question of degree. To keep it alive the part that remains must not be trivial. The foundation of the contract must be found. Here the trading provisions are not the essence of the contract. They are really subsidiary to the provision of the option, which was the substantial purpose of the agreement, so that the contract survives as a whole. Further, the doctrine of frustration cannot apply, since there was no agreement to do a specific thing at a fixed price or on a fixed date and no provision for anything in the nature of continuous trading. The parties took the risk of minor interruptions and any interruptions which did not go to the root of the contract. Here there was no such interruption. This is clear from the terms of the agreement. Clause 2 showed an intention that the contract should be a long-term one, and that even a considerable interruption of supply would not bring it to an end. Clause 7 showed an intention that the option to purchase should not be readily terminated. Clause 4 covered the very matter now in question, indicating that government control should not defeat or frustrate the contract. They referred to *Dahl* v. *Nelson Donkin & Co.* (1); *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (2); *Distington Hematite Iron Co., Ld.* v. *Possehl & Co.* (3); *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products, Ld.* (4); *Bank Line, Ld.* v. *Arthur Capel & Co.* (5); *Larrinaga & Co., Ld.* v. *Société Franco-Américaine de Phosphates de Médulla* (6); *James Scott & Sons, Ld.* v. *Del Sel* (7); *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (8); *Heyman* v. *Darwins Ld.* (9).]

Thomson K.C. and *Philip* (both of the Scottish Bar) for the respondents were not called on to argue.

The House took time for consideration.

May 19. VISCOUNT SIMON L.C.: My Lords, this appeal raises once again the question, which has been so often

(1) (1881) 6 App. Cas. 38, 59.
(2) [1916] 2 K. B. 428.
(3) [1916] 1 K. B. 811.
(4) [1916] 2 A. C. 397, 403.
(5) [1919] A. C. 435.
(6) (1923) 92 L. J. (K. B.) 455.
(7) 1923 S. C. (H. L.) 37.
(8) [1942] A. C. 154, 163.
(9) [1942] A. C. 356.

discussed and decided in the "frustration" cases arising out of the last war and now also out of the present war, whether a particular contract entered into before the war has been brought to a premature conclusion by war regulations which render illegal, and, therefore, prevent, the due performance of some of the obligations or the due enjoyment of some of the rights under the contract. The decision in the present case depends on the application of principles already well settled and, in my view, the conclusion reached by the majority of the Inner House, reversing that of the late Lord Robertson, is correct. Of the various opinions of the majority, that of Lord Wark expresses with great clarity the course of reasoning which has led me to the view that the appeal should be dismissed.

The option of purchase conferred by cl. 8 on the appellants only arises "in the event of the foregoing trading agreement "being terminated by either party as aforesaid" (i.e., by notice under cl. 5). If, therefore, the agreement had already been terminated by intervening events such as the war regulations above referred to, and its further performance had been frustrated by supervening illegality, the basis on which the option might have been exercised by the appellants had ceased to exist. The termination by either party to which cl. 8 refers is the termination of the agreement when it is alive and operative, but the notice of termination in the respondents' letter of July 17 refers to an agreement which has already been brought to an end by supervening events.

This view of the case really concludes the matter, but I should mention two arguments which have been urged by the appellants against the inevitable result. The first is that the contract is, as the Lord Ordinary described it, "of a composite "character," with the result that the part dealing with the sale and purchase of timber might be terminated by frustration without the part dealing with the option to buy the land being brought to an end. This contention breaks down on an examination of the terms of the agreement. It is one agreement, and, as already pointed out, the exercise of the option as to the land depends on the termination of the purchase agreement arising by notice from either party. The other contention was that the substantial purpose of the whole agreement was to provide the option, and that the trading clauses were quite subsidiary, so that the contract survived as a whole and advantage could still be taken of the option clause.

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It is, undoubtedly, true that the principles on which frustration depends require the contract to be examined as a whole, and it may be that the supervening impossibility of fulfilling some minute provision may not be regarded as going to the length of preventing substantial performance of the contract as a whole. If *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (1) was rightly decided, that case would furnish an instance, but, on the facts of the present case, there is no room for the application of such an argument. The preamble of the contract indicates, and the language of most of its clauses shows, that the trading in timber was the main object of the contract. This trading was frustrated and the opportunity for exercising the option thereupon lapsed. I move that the decision of the Court of Session be affirmed and that the appeal be dismissed with costs.

LORD THANKERTON. My Lords, I agree with the opinion of my noble and learned friend on the woolsack, and I have little to add. Counsel for the appellants found himself unable to support the view taken by the Lord Ordinary, that there were in substance two separable agreements. Counsel was rightly impressed by the opening words of cl. 8 of the agreement, which make the termination of the trading agreement under cl. 5 a condition precedent to the arising of the option to purchase the timber yard, but it seems to me that it is equally difficult—for the same reason—for the appellants to maintain that the provisions of cl. 8 and 9 were not ancillary to the trading agreement. If so, it only remains to consider whether, in the words of Lord Loreburn in *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (2) the discontinuance of the trading agreement admittedly caused in the present case was such as to upset altogether the purpose of the trading agreement, and I agree with my noble and learned friend that the purpose of the trading agreement was so upset, and that the opportunity for exercising the option lapsed. I agree with the proposed motion. I may add that it is not necessary in this appeal to consider the consequences arising out of the defeat of the contract, as to which it may be suggested that the law of Scotland and the law of England are not identical.

LORD MACMILLAN. My Lords, the principle of contract

(1) [1916] 2 K. B. 428.

(2) [1916] 2 A. C. 397, 403.

law which has come to be known as the doctrine of frustration and which has recently in England been accorded statutory recognition, is common to the jurisprudence alike of Scotland and of England, although the leading cases are to be found in the English law reports. It is a principle so inherently just as inevitably to find a place in any civilized system of law. The manner in which it has developed in order to meet the problems arising from the disturbances of business due to world wars is a tribute to the progressive adaptability of the common law. In the works of the Scottish institutional writers the matter receives only rudimentary treatment. In Bell's Principles of the Law of Scotland it is not until after the death of the original author that, in the editions which we owe to Sheriff Guthrie, the doctrine begins to assume its modern shape, and is well stated as follows: "When by the "nature of the contract its performance depends on the "existence of a particular thing or state of things, the failure "or destruction of that thing or state of things, without "default on either side, liberates both parties." The earlier cases both in England and in Scotland are mostly concerned with the consequences of the perishing of the thing on whose continued existence the contract depended for its fulfilment, but many of the recent cases have arisen from the supervention of emergency legislation rendering the implement of the contract illegal. It is plain that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done.

The present case belongs to the latter category. It seems to me a very clear one for the application of the principle I have just enunciated. Here is an agreement between two parties for carrying on dealings in imported timber. By emergency legislation the importation of timber has been rendered illegal. Neither party can be said to be in default. The further fulfilment of their mutual obligations has been brought to an abrupt stop by an irresistible extraneous cause for which neither party is responsible. But it has been suggested, and the Lord Ordinary and Lord Jamieson have taken the view, that one of the stipulations of the contract is severable from the rest and remains enforceable, inasmuch as its fulfilment would involve no illegality. This contention is, in my opinion, untenable. It is true that the respondents could, without infringing the emergency legislation sell or let their Grangemouth timber yard to the appellants on the terms stated in the agreement, but the right to require such a sale or lease is conferred on the appellants only as a consequence of one or other of the parties having voluntarily taken advantage of the right to terminate the agreement on notice. The operation of the agreement having been compulsorily terminated, neither party can thereafter terminate it voluntarily. You cannot slay the slain.

I would only add that, in judging whether a contract has been frustrated, the contract must be looked at as a whole. The question is whether its purpose as gathered from its terms has been defeated. A contract whose purpose has been defeated may contain subsidiary stipulations which it would still be possible and lawful to fulfil, but to segregate and enforce such a stipulation would be to do something which the parties never intended. It cannot be suggested with any reason in the present case that the respondents would have conferred on the appellants an option to purchase or take on lease the respondents' timber yard independently of the trading arrangements into which they had agreed to enter. The consideration for the option was the fulfilment of those arrangements and there was no severable consideration. The House is not concerned in this appeal with any question as to the reliefs consequent on frustration as to which the law of Scotland may differ from the law of England. I agree with your Lordships that the appeal should be dismissed and the interlocutor of the Second Division affirmed.

LORD WRIGHT (read by LORD PORTER). My Lords, frustration of a contract, which, though as an expression criticized in the past, has now received legislative sanction in a recent Act—the Law Reform (Frustrated Contracts) Act, 1943—has been described by Professor Winfield, at p. 235, in the 11th edition of Pollock on Contracts which he has edited in the following terms: "After the formation of a contract, "certain sets of circumstances arise which, owing to the fault "of neither party, render fulfilment of the contract by one "or both of the parties impossible in any sense or mode "contemplated by them. These sets of circumstances have "been more or less defined by the courts and are held by "them to release both parties from any further obligation to "fulfil the contract." The rule has sometimes been described as an exception to the general principle that parties must perform their obligations or pay damages for breach of contract. I should prefer to describe it as a substantive and particular rule which the common law has evolved. Where it applies there is no breach of contract. What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene. From that moment there is no longer any obligation as to future performance, though up to that moment obligations which have accrued remain in force. The rule finds its simplest and earliest exemplification where a contract for personal service is frustrated by the death of the contractor during the period of covenanted service. For breaches of contract before his death, his representatives may be held liable, but no one has ever heard of them being held liable in damages for the dead man's failure to perform his contract as from the date of his death. A rule of this character obviously admits of almost indefinite exemplifications, as numerous and diverse as are the possibilities of the performance of a contract being interrupted by a vital change of circumstances. The law, however, has examined a great variety of cases in which it has held or refused to hold that a contract is nullified as to its future by the impact of the frustrating event. The application of the general principle must depend on the circumstances of the particular case. No detailed absolute rules can be stated. A certain elasticity is essential. The topic has been repeatedly elucidated by numerous decisions of this House. Thus in 1919 in the *Bank Line, Ld.* v. *Arthur Capel & Co.* (1) Lord Finlay L.C. felt able to say that the law of the subject was well settled. He referred to the general principle, not particular applications.

It is now I think well settled that where there is frustration a dissolution of a contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach, on the choice or election of either party. It depends on what actually has happened on its effect on the possibility of performing the contract. Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it ex post facto on the actual circumstances of the case. The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circum-

(1) [1919] A. C. 435, 441.

stances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties. The decision is as Lord Sumner said in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (1), " irrespective of the individuals concerned, their temperaments " and failings, their interest and circumstances." The court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment. I find the theory of the basis of the rule in Lord Sumner's pregnant statement (loc. cit.) that the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands. Though it has been constantly said by high authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers, have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said : " Well, if that " happens, all is over between us." On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that the court cannot guess. What it can say is that the contract either binds or does not bind. It is a separate matter whether some ancillary relief should be given, as for a failure of consideration consequent on the frustration, as was held to be proper in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.* (2). To my mind, the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation. I only refer to the point here because it seems to me that the conclusions of both Lord Robertson and Lord Jamieson were affected to some extent by reflecting on what the parties as individuals might or would have decided if they had thought of the possible frustrating cause. I must admit that the view I have stated is somewhat heretical, but the general nature of the doctrine of frustration has given rise to many irreconcilable explanations. In the *Bank Line* case (1) Lord Sumner made an interesting anthology of some of them. In *Hirji Mulji's* case (2), about seven years later, his analysis is more exact and penetrating, but he again (3) emphasizes that, when frustration occurs, it is automatic, and that its legal effect depends not on the intention of the parties or even on their knowledge as to the event, but on its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. I mention these two aspects of the principle here because they are important for the decision of the present case. The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by " informed and experienced minds." What the event was in the present case is not in controversy.

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(1) [1926] A. C. 497, 510.
(2) [1943] A. C. 32.

It is possible to distinguish for some purposes at least three separate matters dealt with by the contract. First, the provisions of the agreement which deal with the trading in timber, that is, the purchase and sale of it; secondly, the provisions which deal with the letting of the yard while the trading is going on ; and, thirdly, the provisions which deal with the option to purchase the yard or take it on long lease which may come into effect when the trading operations cease. The stoppage of trading was in fact due to general orders of the Minister of Supply, acting under his powers under the Defence General Regulations, made after the outbreak of war. The judges in the courts below have held (Lord Jamieson not dissenting) that these orders had the effect of rendering illegal and impossible for an indefinite time the further conduct of the trading operators. If, therefore, the provisions as to trading stood by themselves, it could scarcely have been questioned that the trading adventure was frustrated. Some objections to this conclusion were overruled in the court below and were scarcely relied on before this House,

(1) [1919] A. C. 435.

(2) [1926] A. C. 497, 510.

(3) [1926] A. C. 497, 509.

but assuming that the trading adventure was frustrated, there remained to be considered the effect of that on the provisions for the letting of the yard "to enable the trading agreement "to be carried out." It was not difficult to conclude that this letting was to be concurrent with the trading operations which it was intended to enable and would fall with them when they were frustrated, but it was different with the option to purchase provided for by cl. 8. That option was only to come into force when the trading operations were terminated and only when they were terminated by the election of one party. In the words of the clause: "In the event of the foregoing trading "agreement being terminated by either party as aforesaid" (that is, under cl. 5) "the second parties" (the appellants) "shall have the right as at the date of termination of said "agreement to purchase the said ground and all buildings and "erections thereon at a price of 4,000*l*." There was also in cl. 9 an alternative option for the appellants to take "the said "ground and buildings and railway sidings thereon at an "annual rent of 500*l*."; under cl. 9 the lease was in the first instance to be for five years, but renewable up to the total period of ninety-nine years from May 28, 1929.

The events relied on as constituting frustration were the Control of Timber Orders made under the Defence Regulations and necessitated by the state of war. The agreement had been in operation for about ten years at the date of the earliest of the orders, the Control of Timber (No. 4) Order, 1939, which came into force on September 16, 1939, and was replaced and continued thereafter by similar orders. It was beyond controversy and was indeed agreed that the effect of these orders was to prevent the current operation of the agreement so far as it related to the supply of timber by the appellants to the respondents. The appellants' stock of timber was exhausted about the end of September, 1939, and from that date it was impossible to supply further timber to the respondents. In addition, the orders would have made it illegal for the appellants, even if they had timber to supply, to supply it in accordance with the conditions of the agreement as to price and otherwise. It is true that the agreement was for an indefinite time, and that the war might end within a comparatively short period. The position must be determined as at the date when the parties came to know of the cause of the prevention and the probabilities of its length as they appeared at the date of the order, but subsequent events ascertained at or before the trial may assist in showing what the probabilities really were (as Lord Sumner said in *Bank Line, Ld.* v. *Arthur Capel & Co.* (1). In addition, there is to be remembered the principle stated by Lush J. in *Geipel* v. *Smith* (2), that "a state of war must be presumed to be "likely to continue so long, and so to disturb the commerce "of merchants, so as to defeat and destroy the object of "a commercial adventure." It is true that Lush J. was there referring to a single definite adventure, not to a continuous trading, but the real principle which applies in cases of commercial responsibility is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period. Lord Shaw emphasized this principle in the *Bank Line* case (3), and so did Lord Sumner (1). This, I think, is the true basis of the rule. It does not depend simply on the consideration that when the interruption ceases conditions of performance may be different, though that may also be worth dwelling on in certain cases, as in *Metropolitan Water Board* v. *Dick Kerr & Co. Ld.* (4), where it was said that the interruption destroyed the identity of the performance contracted for. In the present case the suspense has already lasted for more than five years, and it may be many years still before the government controls are removed.

Lord Robertson and the judges in the Second Division, Lord Jamieson not dissenting on that point, have held that qua trading and the ancillary use and occupation of the yard for the purpose of trading the contract was frustrated, but there still remained the crucial question, what effect that frustration had on the option to purchase the yard which was the subject of cl. 8. The language of the clause was very precise and specific. It was to operate in the event of the trading agreement being terminated by either party by the notice specified in cl. 5. Lord Robertson was not unconscious that this raised a difficulty in the way of the appellants' claim that they were entitled to exercise the option to purchase, and had, in fact, duly exercised the

(1) [1919] A. C. 435, 454.
(2) (1872) L. R. 7 Q. B. 404, 414.
(3) [1919] A. C. 435, 449.
(4) [1918] A. C. 119.

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option by their notice of July 17, 1941, but he decided in their favour on the ground that, notwithstanding the precise language of the clause conferring the option, what the parties would have agreed, if their minds had been directed to the point, would have been that the event of a frustration of the trading agreement would not have cancelled the option, but have opened the door to its exercise. He treated the " purchase agreement," as he called it, as a separate and self-subsistent agreement, standing on its own legs and remaining in force though the legs were cut from under the trading agreement, but the learned judge failed to observe that, even so, the right of exercising the option to purchase was expressly dependent on the single event of the trading agreement being terminated by notice. That being the condition precedent, the right could not arise if it was not fulfilled. The Lord Justice-Clerk, in his cogent judgment, rejected the appellants' contention. A notice to terminate must imply that there is something to terminate. According to the conditions expressed in cl. 8, the right to exercise the option to purchase never arose and cannot now arise if, as the fact is, the trading agreement was terminated by frustration.

The learned counsel for the appellants, faced with this difficulty, based his contentions before this House on a different ground. He argued that the whole agreement was one and indivisible, of which the trading agreement and the option to purchase formed integral parts, and that the impossibility of fulfilling the trading agreement did not destroy the contract as a whole because cl. 8 remained in effect. It was still capable of fulfilment, and remained open to the appellants, unless and until they thought fit to give notice of termination of the trading agreement, which they did by their letter of July 17, 1941, in accordance with cl. 5. Thereupon they became entitled to exercise the option to purchase, and did exercise it by the letter. The result of this view would be that the appellants could postpone indefinitely giving notice of termination and thus keep alive for an indefinite time their right of election and so retain their hold upon the yard. This would be an unreasonable and inequitable position, but I do not think that the contention is sound. I do not question that the right to exercise the option, whatever it may be, is part of the consideration for the entire agreement. Nor do I doubt the possibility that there might be cases in which the contract provides for various matters to be performed in such a way that the impossibility of performing some of the stipulations might not frustrate the contract as a whole. Such a case may be illustrated by the decision of the Court of Appeal in *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (1). The contract there was for the supply of gas and lighting, and for the repair and maintenance of the lighting system. In January, 1915, lighting regulations, by reason of the war, prohibited the lighting of the lamps. The case was heard before the law had been settled and elucidated, as it has since been, by the three decisions already referred to, *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (2), *Bank Line, Ld.* v. *Arthur Capel & Co.* (3), *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (4), and much that was said by the Court of Appeal in *Leiston's* case (1) would not have been said at all, or would have been said differently, if the court had had the advantage of the views of this House. Scrutton J., however (5), does state the issue to be whether the failure to supply was " of " such a lengthy and permanent character as substantially to " alter the mode of performance " so as to terminate the contract. He decided that it was not, treating it as a question of fact and degree. I am not clear that the same decision would be given to-day. But questions of applying the doctrine may always be difficult to solve. So far as principle goes, the decision is important, in so far as it directs attention to the test, which is, what is the substantial contract and is that frustrated. Looking at this contract and to the frustrating event, I think it would be unreasonable not to regard the trading agreement as the substantial matter, so that when that is frustrated so is the contract as a whole. It would not be possible, in my opinion, to regard the whole contract as surviving when the trading agreement became frustrated. I need not consider another possible view, namely, that cl. 8 and 9 survived as a separate agreement, in the way that the arbitration clause in *Heyman* v. *Darwins, Ld.* (6) was, in the opinion of the Lord Chancellor, capable of surviving as an independent clause. That would not help the appellants here, because cl. 8, for whatever reason, is quite plain and specific, as I have already said, in the limited and grudging terms in which it grants the option to purchase. The option

(1) [1916] 2 K. B. 428.
(2) [1918] A. C. 119.
(3) [1919] A. C. 435.
(4) [1926] A. C. 497.
(5) [1916] 2 K. B. 428, 439.
(6) [1942] A. C. 356, 367.

does not derive from the general character of the contract, but from the specific words of cl. 8. When the trading ceased the free use of the yard would revert to its owners in the absence of a new and special grant. The stringent and limited character of the express condition of the option under cl. 8 must receive effect from the court. The condition was not, and in the events could not be, complied with by the appellant. The question whether Scots law would give any or what restitution to the appellants for alterations and improvements effected upon the yard during the period of their occupation is not before the House. I would dismiss the appeal.

LORD PORTER. My Lords, the dispute which has arisen in this case requires for its solution the determination whether a contract between the parties dated July 10 and 25, 1929, has or has not been discharged by supervening impossibility of performance or—to use the current but inelegant phraseology—whether its future performance has been frustrated. The respondents maintain that it has, the appellants contend that it has not. The vital terms have been set out and it is not necessary that I should do so again, though I must refer to some of the provisions in order to explain my conclusions.

The principles on which it will now be held that a contract has been frustrated are well established. Probably they have nowhere been more succinctly stated than by Earl Loreburn in *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (1): " A court can and ought to " examine the contract and the circumstances in which it was " made, not of course to vary, but only to explain it, in order " to see whether or not from the nature of it the parties must " have made their bargain on the footing that a particular " thing or state of things would continue to exist. And if " they must have done so, then a term to that effect will be " implied, though it be not expressed in the contract . . . " No court has an absolving power, but it can infer from the " nature of the contract and the surrounding circumstances " that a condition which is not expressed was a foundation " on which the parties contracted." Whether this result follows from a true construction of the contract or whether it is necessary to imply a term or whether again it is more accurate to say that the result follows because the basis of the contract is overthrown, it is not necessary to decide.

(1) [1916] 2 A. C. 397, 403, 404.

The principle is well established but it is the contract as a whole which has to be considered, not a part only. As is said in the latest (11th) edition of Pollock on Contracts, edited by Professor Winfield, at p. 255: " Further, it is to be observed " that the disturbing cause must go to the extent of sub- " stantially preventing the performance of the whole contract. " Interference leaving a considerable part capable of per- " formance will not be an excuse." For this proposition *London and Northern Estates Co.* v. *Schlesinger* (1) is quoted, and I think *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council* (2) if it be rightly decided might have been added. I would willingly adopt this view except that I should prefer the expression " contract as a whole " instead of " the whole contract."

The dispute, however, as in so many of these cases, centres not on the principles to be applied, but on their application to the facts of the individual case. The contract under consideration stated in its preamble that it had been arranged between the parties that the respondents should purchase all their supplies of red and white pine wood from the appellants, and should let to them without rent, but on payment of the feu duties, a certain timber yard, with an option of purchase or long lease on certain terms and conditions which it was right and proper to reduce to writing. After this preamble the first seven clauses deal with the purchase and sale of the wood and the letting without rent. Three of these clauses were much relied upon by the appellants. Clause 2 fixes the price of the timber on a sliding scale dependent upon the landed cost to and expenses of the appellants. It was said that this showed an intention that the contract should be a long term one, and that even a considerable interruption in possibility of supply would not bring it to an end. Clause 4, after placing an obligation on the respondents to use their best endeavours to sell the wood, declares that they shall have no control over the buying or selling of the appellants, that the contract shall in no way limit the appellants' right to sell to others, and that nothing in the agreement should override or otherwise affect any arrangements entered or to be entered into by the appellants, or any conditions imposed on them as to price or otherwise in regard to the purchase or disposal thereof. This provision was said to deal with the very matter under consideration and to be an express term arranging that no

(1) [1916] 1 K. B. 20.

(2) [1916] 2 K. B. 428.

governmental control should defeat or frustrate the contract. Finally, it was said that the right given by cl. 7 to the appellants to alter the railway lines to suit the trade and to lay additional lines showed an intention that the option to purchase should not readily be terminated. It was also urged in general support of the appellants' case that there was no provision in the contract compelling the appellants to use the yard for the purpose of their trade with the respondents. On the contrary, by cl. 1, they were expressly entitled to deliver the timber at Phœnix Saw Mills, and from this it was deduced that the terms of sale and purchase of the timber were independent of those dealing with the lease or sale of the land. It is not until cl. 8 is reached that the agreement giving the right of purchase or long lease is set out, but it is urged that a purchase outright or a long lease extending up to ninety-nine years from the making of the agreement is an important and far-reaching term of the contract, at least as important as the sale and purchase of the timber, and might of itself be said to be the basis or one of the bases of the contract.

I have set out the provisions of the contract somewhat fully, because, as is indicated above, the question for your Lordships' determination as I see it is not a question of principle but of the interpretation of a particular contract. Before, however, I express a view on this point I ought to state that originally it was argued on behalf of the appellants that the contract could in reality be divided into two parts, one being a contract for the sale and purchase of timber and the other dealing with the land. It was said that, if this were so, the former might be frustrated, whereas the latter would not. This argument appears to have prevailed with the Lord Ordinary and would be formidable were it not for the express terms of cl. 8 which do not seem to have been brought to the notice of the learned judge. It was eventually abandoned by counsel for the appellants, and, as I believe all your Lordships think, rightly so. It is true that the contract itself does refer in more than one place to "the trading agreement," as distinguished from the rest of the contract, but the contract itself is a single one and so interrelated in its parts as to make it difficult completely to separate some from the others. Moreover, the right of purchasing or leasing the land is not given upon the termination of the "trading agreement" simpliciter, but by cl. 8 on termination of the trading agreement "as aforesaid," i.e.,

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by notice from either party. Unless, then, the trading agreement survived at the time when notice was given by the appellants, the termination had not taken place in that particular way and a condition precedent to the right to purchase or lease was missing. Recognizing this difficulty, the appellants' advocates argued alternatively that the contract as a whole survived, that one of its more important provisions had not been affected by the governmental restrictions upon the importation of timber, and that, though one of the objects of the contract, viz., the sale and purchase of timber, was prevented, yet that prevention was only a temporary interference with the fulfilment of the contract which could still be fulfilled so far as concerned the transfer of the land, and, therefore, survived as a whole, none the less that the trading agreement, if it had stood alone, would have been frustrated. So far as concerns the specific clauses on which reliance was placed, I think they can all be explained as intended to deal with a normal state of affairs and having no reference to a complete cessation of the timber supply by governmental interference, and it is a commonplace of this class of case that a provision meant to deal with a temporary interference will not be construed to have application to a complete prevention of the underlying object of the contract. In this connexion it is enough to quote the *Tamplin* case (1), where there was an exception of restraint of princes, and *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (2) which contained express terms dealing with the effect of delay by reason of the contract being impeded. As to the basis or underlying object of the contract, I cannot doubt but that throughout it was the carrying out of the contract to supply and to take the timber contracted for. The agreement to let the yard with the option of purchase appears to have had for its object the provision of space which could be used either for the delivery of timber under this contract or to fulfil other contracts if timber for this contract was supplied at the Phœnix Saw Mills. No doubt, both parties contemplated, as part of the scheme, that a long series of transactions and a long period of dealing might induce the appellants to alter the railway lines and otherwise accommodate the yard to their own use, and that for this reason they should be given the option, but, to my mind, this was part of the timber selling scheme and in itself neither formed a basis of the contract nor would have

(1) [1916] 2 A. C. 397.

(2) [1918] A. C. 119.

been thought of had not the relation of buyer and seller of timber been entered into.

As in many questions where the law has to be applied to the facts, I recognize that the weight to be attributed to the different considerations will affect different minds in different ways. Indeed, in the present case Lord Jamieson took the view that, having regard to the importance of the provisions in reference to selling or leasing the land, the contract was not frustrated. The conclusion must depend on a question of proportion: How much importance one attaches to the disposition of the land in relation to the timber contract. With all respect to the opinion of that learned judge, and though I feel the force of his arguments, I find myself in agreement with the majority of the Second Division of the Court of Session in thinking that the contract as a whole was frustrated at some time before the notice to terminate was given, and accordingly I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Stephenson, Harwood & Tatham*, for *Dundas & Wilson, C.S., Edinburgh.*

Solicitors for respondents: *Neve, Beck & Co.*, for *Cowan & Stewart, W.S., Edinburgh.*

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Feb. 7, 8, 9, 10, 14; *May* 19.

F. P. H. FINANCE TRUST, LD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Sur-tax—Investment company—Income "consisting mainly "of investment income"—Trading loss greater than investment income —Finance Act, 1936 (26 *Geo.* 5, *and* 1 *Edw.* 8, *c.* 34), *s.* 20, *sub-ss.* 1, 6 (*a*) (*b*).

By s. 20 of the Finance Act, 1936: "(1.) The following pro-"visions of this section shall have effect as respects companies "(hereafter in this section referred to as 'investment companies') "the income whereof consists mainly of investment income, that "is to say, income which, if the company were an individual, "would not be earned income as defined in sub-s. 3 of s. 14 of the

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* *Present*: VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN and LORD PORTER.

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"Income Tax Act, 1918 . . . . (6.) Where . . . . an order has "been made or a resolution passed for the winding-up of an "investment company to which s. 21 of the Finance Act, 1922, "applies, the following provisions shall have effect :—(*a*) the actual "income of the company from all sources since the date of the "order or resolution shall, for the purposes of assessment to sur-"tax, be deemed to be the income of the members ; (*b*) the Special "Commissioners shall from time to time by notice in writing to the "liquidator direct that the amount of that income for the year or "period specified in the notice shall be deemed for those purposes "to be the income of the members for that year or period, and the "amount thereof shall be apportioned and sur-tax assessed and "charged accordingly."

A company, to which s. 21 of the Finance Act, 1922, applied, carried on general financial business until April 1, 1938, when it went into liquidation. During the previous fifteen months it had carried on business at a loss exceeding in amount its investment income received during that period, but its non-investment income for the totality of years from April 1, 1930, to March 31, 1938, for which alone figures were in evidence, greatly exceeded its investment income for that period. The Special Commissioners having addressed to the liquidator a direction under s. 20, sub-s. 6, of the Finance Act, 1920 :—

Held (per Viscount Simon L.C., Viscount Maugham, Lord Atkin and Lord Porter, Lord Russell of Killowen dissenting), that the company was not one "the income whereof consists mainly of "investment income," and, accordingly, that it was not an "investment company" within s. 20, sub-s. 1, of the Act.

Decision of the Court of Appeal [1943] K. B. 345 reversed.

Appeal from the Court of Appeal.

The appellant company, to which s. 21 of the Finance Act, 1922, applied, carried on a general financial business, including underwriting and dealing in options. Its main business, however, was that of dealing in stocks and shares. The statement of statutory profits and losses from April 1, 1930, to April 1, 1938, showed the following figures : twelve months to March 31, 1931 : trading loss, 8,944*l.*, gross taxed dividends, 80*l.* ; twelve months to March 31, 1932 : trading loss, 10,999*l.*, gross taxed dividends, nil ; twelve months to March 31, 1933 : trading profit, 28,305*l.*, gross taxed dividends, 4,985*l.* ; twelve months to March 31, 1934 : trading profit, 189,899*l.*, gross taxed dividends 9,136*l.* ; twelve months to March 31, 1935 : trading profit, 129,024*l.*, gross taxed dividends, 44,825*l.* ; twenty-one months to December 31, 1936 : trading profit, 633,180*l.*, gross taxed dividends, 225,637*l.* ; twelve months to December 31, 1937 : trading loss, 412,464*l.*, gross taxed dividends, 82,145*l.* ; three months to April 1, 1938 : trading loss, 72,202*l*., gross taxed dividends, 11,668*l*. The profit and loss account for the year ended December 31, 1937, showed (inter alia) 81,385*l*. 10*s*. 11*d*. profit on shares sold, 70,699*l*. 2*s*. 9*d*. dividends received less tax and 400,000*l*. depreciation of securities held as stock in trade. The profit and loss account for the three months ended March 31, 1938, showed (inter alia) 17,437*l*. 7*s*. 6*d*. profit on shares sold, 8,659*l*. 9*s*. 9*d*. dividends received, less tax, and 13,149*l*. 18*s*. 11*d*. depreciation of securities held as stock in trade. On April 1, 1938, the appellant company passed a resolution for voluntary winding-up. It continued down to that date to carry on the business of dealing in shares. For the year ended April 5, 1938, it claimed relief under s. 34 of the Income Tax Act, 1918, by reference to the loss it had sustained in that year and the claim was allowed. On January 11, 1940, the Special Commissioners addressed to the liquidator a direction that for the purposes of assessment to sur-tax the actual income of the appellant company for the year ended April 5, 1939, should be deemed to be the income of the members and the amount thereof should be apportioned among the members. On the same day they gave notice to the liquidator that they had apportioned the amounts as follows: National Mining Corporation, Ld., 13*l*. 14*s*. 7*d*.; Mrs. E. Mayo, 5,643*l*. 3*s*. 10*d*.; Mrs. G. Latilla-Campbell, 5,643*l*. 3*s*. 10*d*.; Mrs. E. M. Latilla, 5,644*l*. 17*s*. 9*d*. The appellant company appealed against the direction and the appeal was heard at a meeting of the Special Commissioners. Paragraph 8 of the case stated for the opinion of the King's Bench Division set out: "It was contended on behalf of the "appellant company that at the date of the passing of its "resolution for winding-up the company was not an investment company within the meaning of s. 20 of the Finance "Act, 1936 . . . ." Paragraph 9 set out: "For the "respondents it was contended that on the evidence the "appellant company was at the date of liquidation and had "been for a period of fifteen months prior to April 1, 1938, "deriving income solely from investments. These facts were "sufficient to bring it within s. 20 for the year 1938–39." Paragraph 10 set out: "We, the commissioners who heard the "appeal, accepted the contention of the respondents and "confirmed the direction." Macnaghten J. dismissed an appeal by the appellant company on a case stated by the commissioners and affirmed their determination in favour of the respondents. The Court of Appeal (Goddard and du Parcq L.JJ.

Scott L.J. dissenting) dismissed an appeal by the appellant company which appealed to the House of Lords.

Tucker K.C. and *F. H. Talbot* for the appellant company. The company, at the date of the passing of the resolution for winding-up was not an "investment company" within s. 20, sub-s. 1, of the Finance Act, 1936, because it had no income that was not "earned income" within s. 14, sub-s. 3, of the Income Tax Act, 1918. It is true that, had it been purely an investment-holding company, it would have come within the definition of s. 20, sub-s. 1, but the interest and dividends received by it arose from the various stocks and shares in which it was dealing. It was only by the way that these stocks and shares produced dividends, just as a cattle dealer might find his stock increased by the progeny of some of his beasts. These dividends and interest were, therefore, immediately derived by the company from the carrying on or exercise of its trade as a dealer in stocks and shares within s. 14, sub-s. 3 (*c*), of the Act of 1918. Consequently, the Crown had an option to assess these dividends and interest to tax under case I of sch. D notwithstanding (*a*) that any such dividends were paid by a British company with or without deduction of tax under r. 20 of the General Rules, and (*b*) that any such interest was primarily charged to tax under sch. C. Those dividends and that interest were, therefore, income charged under sch. D and so were themselves "earned income" within the meaning of s. 14, sub-s. 3 of the Act of 1918. [They referred to *Neumann* v. *Inland Revenue Commissioners* (1); *Cull* v. *Inland Revenue Commissioners* (2); and *Barnes* v. *Hely-Hutchinson* (3).] [*Sir David Maxwell Fyfe S.-G.* This point was not raised below. Till now it has been conceded that the investment income was unearned income. Had it not been conceded there would have been a question of fact for the commissioners, namely, which of the dividends were the product of the company's trade? The House of Lords would then have had complete information before it. There has been no opportunity for investigating the repercussions of the appellant's suggestion that sch. C income would be taxed under case I of sch. D. It would be unsatisfactory if the matter came before the House in this manner.] [VISCOUNT SIMON L.C. The House does not feel that this additional point

(1) [1943] A. C. 215.
(2) [1940] A. C. 51.
(3) [1940] A. C. 81.

is open to the appellant.] Only if a company has in fact an "actual income from all sources" can s. 21 of the Finance Act, 1922, as supplemented by s. 20 of the Finance Act, 1936, operate against it. "The income whereof" in the latter section has reference to the "actual income from all sources" in sub-s. 1 of the former section, i.e., income as computed for income tax purposes since that is what the Act is dealing with. The total income must be examined to see of what it consists, not something less than the total income or any particular part of the income. The question is not whether the company had any unearned income, and, if so, whether its amount was greater than that of any other income that it had. When a company's total income for any period is either nil or negative, it has no income that can consist of anything. In the last fifteen months before the liquidation and in the whole of the income tax year ended April 5, 1938, the company's receipts from investments were more than counterbalanced by its trading losses, and so it had no income which could consist mainly of anything. [They referred to the Finance Act, 1922, sch. I, para. 6, the Finance Act, 1927, s. 32, s. 38, sub-ss. 1 and 2, s. 39, sub-ss. 2 and 3 and s. 42, sub-s. 4, and the Finance Act, 1936, s. 19, sub-s. 1 (*c*).] The effect of s. 20 of the Finance Act, 1936, is to require an answer to the question whether the company was an investment company, not during any prescribed period, but at the point of time of the winding-up resolution. The words "mainly consists" in sub-s. 1 are in the present tense, but there is a distinction between the present tense in the immediate sense and the present tense of habit. The words here are in the latter category, just as a man may say that his hobby "mainly consists" in sailing on the Norfolk Broads though he has not been able to sail there since 1939. It can only be decided whether a company is an "investment company" by considering its incomings and outgoings over some period of time, and the period taken for the purpose must be a reasonable period, such a period as enables a true comparison to be made between earned income, on the one hand, and other kinds of income, on the other. The Special Commissioners should not have limited their review to the fifteen months preceding the date of the liquidation without considering whether it was a reasonable period. Alternatively, if they did select this period on the ground that it was a reasonable period, there was no evidence to support that conclusion. The company's trade was a speculative one in

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which the results were liable to considerable fluctuation, and no true comparison could be made if only the periods of depression were considered to the exclusion of the periods of prosperity. The phrase " consists mainly " should be taken as meaning " normally consists mainly."

F. H. Talbot following. To answer the question whether this is an " investment company " it is true that one must take one's stand at the moment where it was about to go into liquidation and ask of what did its income mainly consist. If, however, using the present tense, I asked a man : " Of what does your " income mainly consist ? " he might properly reply that he had a little house property producing rents and a few investments producing dividends, but that the main source of his income was his business which might be subject to fluctuation and for twelve months he might have lost money on it. But still the answer to the question would be that the main source of his income was that business. On the Crown's contention the company's condition of being or not being an " invest- " ment company " might vary from year to year or even from week to week. A better construction of the words of the Act would require one to consider the company's income over a period, to go back and review its past history. One must take a period sufficient to observe a turn of the wheel of fortune. That would be clear in the case of a shipping company, and it is necessary also in the case of a company dealing on the Stock Exchange. The period taken must cover wave crest to wave crest and trough to trough.

Sir David Maxwell Fyfe S.-G., J. H. Stamp and *R. P. Hills* for the respondents. The direction was rightly made. It was clearly contemplated in s. 20, sub-s. 1, of the Finance Act, 1936, that the company in question should have different and distinguishable kinds of income, both earned and unearned, which had to be compared in regard to their respective amounts. This company had unearned income. The material words are " the income whereof consists mainly of unearned income " and " income " there means the totality of elements of income under the Income Tax Acts before addition or subtraction : see Income Tax Act, 1918, s. 100, sub-s. 1 ; Finance Act, 1922, s. 22, sub-s. 1 ; and *Coman* v. *Governors of the Rotunda Hospital, Dublin* (1). Where the Acts intend that there should be addition or subtraction they use the words " total income " from all sources " or " actual income from all sources."

(1) [1921] 1 A. C. 1, 10.

The words of sub-s. 1 of s. 6 of the Act of 1936 permit of no deduction. The statutes maintain a distinction between these expressions and the term " income " : see Finance Act, 1920, s. 17, sub-s. 1 ; Finance Act, 1922, sch. I, paras. 4 and 6 ; Finance Act, 1927, ss. 32 and 38 ; Finance Act, 1936, s. 19 ; Finance Act, 1936, s. 14, sub-s. 2 ; and Finance Act, 1939, s. 14, sub-s. 1, and s. 15. " Income " has a wide sense when left unqualified, but the phrases " total income from all " sources " or " actual income from all sources " give it a special sense. This is so, in particular, in sub-s. 6 of s. 20 of the Act of 1922. The framework and procedure of s. 34 of the Income Tax Act, 1918, connote that " income " means sources of income bringing in a positive result. The provisions of s. 42, sub-s. 4, of the Finance Act, 1927, as to the bases of sur-tax, are irrelevant in this problem. Under that sub-section the taxpayer's " total income " must be ascertained, but here the question of " total income " does not arise. The mischiefs at which the successive steps in company sur-tax legislation were directed and these successive steps themselves support the view that a positive investment income larger than the trading income and capable of being paid as capital in a liquidation was the target of the machinery of sub-s. 6 of s. 20 of the Finance Act, 1936 : see *Penang & General Investment Trust, Ld.* v. *Inland Revenue Commissioners* (1). Previous legislation had already dealt with other gaps in the law on this point, the winding-up gap, the second company gap, and the loan creditor gap : Finance Act, 1927, ss. 31 and 32, and Finance Act, 1936, s. 20. It is clear that Parliament considered the comparison of incomes from different sources a sufficient test. If the appellant's argument were sound, it would be possible for a company which by chance or design had made a loss in one year to be kept in liquidation indefinitely while continuing to hold its investments. The fact that the company has gone into liquidation is one of the matters that the commissioners must take into consideration. The income of this company " consists " mainly of investment income " since that is the only source of income left to it. If a river is fed by two streams and one dries up, then the other becomes the main source. The decision as to what period should be regarded in answering the question of fact set by s. 20, sub-s. 1, of the Finance Act, 1936, is a decision of fact, and there was evidence on which the Special Commissioners could come to the decision at which they arrived.

(1) [1943] A. C. 486.

They were not bound to look at any period beyond the last fifteen months. The period will vary from company to company. The definition of "investment companies" in the sub-section limits one to a judgment on results and not on the activities which brought them about. It is, therefore, immaterial how large one set of activities may bulk as compared with another. This bears on the period to be regarded by the Special Commissioners. Further, the definition of "investment "companies" operates, not only in the case of a winding-up, but also for the purposes of the other sub-sections of s. 20 of the Act of 1936. It applies to those different cases at the moment of time at which each of the matters dealt with arises, and in each case regard must be had to the income accruing at the moment of time which is critical to the result. [They referred to the Finance Act, 1927, s. 31, sub-s. 4; Finance Act, 1936, s. 20, sub-ss. 2 and 5; Finance Act, 1937, s. 14, sub-ss. 2 (*a*) and 3; Finance Act, 1939, ss. 14 and 15; and Income Tax Act, 1918, s. 33, sub-s. 1.]

J. H. Stamp following. The test whether this is an investment company focusses on the critical moment at which it is to be applied, viz., the moment of the company's going into liquidation. The test is mathematical, namely, to find out the company's income from each of its sources of income at that moment and to see whether the investment or the non-investment income is the greater. Say that on November 1, 1943, a company had as its sole asset 500,000*l.* consols and on the following day went into liquidation. Then, no matter what its past history and even if it had just ceased to do profitable business, it was an investment company within the definition since at that moment it cannot be said to have any income but investment income. Nothing else need be known because that single fact is sufficient on the plain meaning of s. 20, sub-s. 1, of the Act of 1936. In the present case all the facts before the Special Commissioners were addressed to ascertaining that one relevant fact. So, too, if a trading company making a steady 10,000*l.* a year also had an investment holding producing during a series of years 15,000*l.* a year and if in one year the investment income dropped below 7,000*l.* the company could not in that year be an investment company. In some cases, it is true, the income of a company in a previous year may be some evidence of the material fact, but past events are only relevant as evidence of what was the income of the company at the crucial date of liquidation to give a true picture of the source of that income. For instance, to find what was the rate of consumption of water in a flush system at a particular time, a period of calculation would have to be taken, long enough to include a whole cycle of events. In the case of a company which sold its business in the currency of the year and bought another as a going concern with the proceeds, then, to find what the company was earning at the crucial time, one would have to look at the receipts of the new business before the sale. In examining a company's income for the purposes of this sub-section one must compare the income from different sources, the accruing streams flowing into the total income. It is a fallacy to say that at a particular moment a company has no income, for its life is made up of successive moments. The relevant question is not whether the company has any income, but whether it has any investments. By the operation of s. 33 of the Finance Act, 1926, a company which had made a loss in one year and carried it forward in subsequent years might have no income for income tax purposes and yet it might still be an investment company within the definition. [He referred to the Income Tax, 1918, ss. 34 and 100, sub-s. 1 (*b*).]

Tucker K.C. in reply. Parliament was not legislating for companies without any income. When its trading loss is equal to or greater than its investment income a company goes out of the purview of s. 20 of the Act of 1936 altogether. " The income whereof " means the total income for income tax purposes, i.e., from all sources. [He referred to the Finance Act, 1937, sch. III, para. 1, and *Tatem Steam Navigation Co., Ld.* v. *Inland Revenue Commissioners* (1).]

The House took time for consideration.

May 19. VISCOUNT SIMON L.C. My Lords, the question to be decided is whether the appellant company at the date of its going into liquidation, viz., April 1, 1938, was an " investment company " as defined in sub-s. 1 of s. 20 of the Finance Act, 1936. If it was (since it was admittedly a company to which s. 21 of the Finance Act, 1922, applied: see sub-s. 6 of that section, together with s. 19, sub-ss. 1 and 2 and s. 20, sub-s. 3, of the Finance Act, 1936), then, on a Direction of the Special Commissioners addressed to the liquidator on January 11, 1940, to that effect, the income of the appellant company for the year ended April 5, 1939, was, for the purposes of assessment to sur-tax, deemed to be the income of the members. The result of this would be that income assessed to sur-tax of each of three ladies who were members or loan creditors of the company was increased by between 5,000*l.* and 6,000*l.* whereas, if the company did not fall within the definition of an " investment company " in s. 20 of the Act of 1936, the profits of the company since the liquidation would not attract sur-tax at all—either in the hands of the company or in the hands of the three individuals, because, when distributed to them in the liquidation, the amount would be in the nature of capital received by them. An " investment " company " is defined in s. 20, sub-s. 1, of the Act of 1936 as a company " the income whereof consists mainly of investment income, that is to say, income which, if the company " were an individual, would not be earned income as defined in " sub-s. 3 of s. 14 of the Income Tax Act, 1918." The definition of earned income here referred to is the definition used to decide, in the case of an individual, the deduction which he may be allowed, in assessing his income for the purpose of income tax, on the ground that his income, or part of it, is " earned income." Income derived from carrying on a trade or profession, or from an employment of profit, is, for example, " earned." Income from investments—at any rate, if they do not arise from carrying on a trade—is " unearned."

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(1) [1941] 2 K. B. 194.

For four successive periods beginning with April 1, 1932, and ending with December 31, 1936 (the last being a period of twenty-one months owing to a change in the date up to which the company made up its accounts), large profits had been made from the company's main business and a considerable though smaller profit from dividends from investments. During these years, therefore, the company could not have been regarded as an investment company within the definition. For the twelve months following, however (April 1, 1936, to March 31, 1937), the company's trade of dealing in stocks and shares was carried on at a loss of 412,464*l.*, and for the next three months up to the date of liquidation (April 1, 1938) also at a loss of 72,202*l.*, while the income from investments during these respective periods was 82,145*l.* and 11,668*l.* respectively.

Two objections are urged against the view, which has prevailed in the courts below, that the company is an " investment company " within the definition. The first is that, for the last fifteen months before liquidation, the company's receipts from investments were more than counterbalanced by its trading losses, and, therefore, it is argued, it had no "income" at all. Its income, therefore, could not "consist" of anything. On this view a company which is suffering a trading loss could not fall within the definition unless its investment income was greater than its trading loss and left it on balance with an "income." The second objection taken is that, in deciding whether the company at the date of liquidation was an "investment company," the commissioners should not have limited their review to the fifteen months prior to the date of liquidation, but should have considered the history of the company as a whole.

As regards the first objection, du Parcq L.J. in a most careful judgment has advanced the view that s. 20, sub-s. 1, of the Act of 1936 requires us to look at two categories of possible income, (*a*) earned income, and (*b*) investment income, and to compare their size. If under category (*a*) we find a figure of loss and under category (*b*) a figure of profit, the company's main income consists of investment income and the definition applies notwithstanding that the figure of investment profit is the smaller of the two. With all respect to the Lord Justice, I am unable to accept this application of the sub-section. It is true that the sub-section requires us to ascertain the amount of the investment income, but the sub-section does not in terms require us to ascertain as a separate item of account the amount of the earned income or to compare that amount with the ascertained amount of the investment income. What the sub-section does require is that this last mentioned amount should be compared with the amount of the company's "income." An investment company is defined by the sub-section as a company the "income whereof consists mainly "of investment income," and I can see no sufficient reason for giving to the words "income whereof" contained in the sub-section anything other than the meaning they ordinarily bear in legislation, such as this is, which is concerned with the imposition of sur-tax, viz., income from all sources ascertained in accordance with the Income Tax Acts. This, too, is in substance the meaning given to the word "income" in the world of commerce. If a company in the course of a year's trading carries on its business at a loss exceeding in amount the investment income received during the year, its income for the year would be described among business men as having been nothing, but, if the company's income be nothing, it cannot be said to consist, whether mainly or otherwise, of any particular item of income. As it does not exist it cannot "consist" of anything. The view I take is, I think, confirmed by the fact that in such a case as this the taxpayer can claim repayment of income tax suffered on investment income (under s. 34 of the Income Tax Act, 1918) " by reference to the loss " and to the aggregate amount of his income for the year."

In my opinion, a company such as I have described above is not an investment company within the meaning of the sub-section. It has been suggested that the use of the words " income from all sources " found in sub-s. 6 of s. 20 indicates that the word " income " in sub-s. 1 must have been used by the legislature in some narrow sense. I am not impressed by this argument. The object of sub-s. 6 is in substance to make applicable to investment companies in liquidation the provisions of (among others) s. 21, sub-s. 1, of the Finance Act, 1922. In that sub-section the income of a company that is dealt with is referred to as its income from all sources and it was only to be expected that sub-s. 6 of the Act of 1936 making sub-s. 1 of the earlier Act applicable to investment companies in winding-up should have used the same language as is to be found in such earlier Act. Having reached the view that the first objection is well founded, it is not necessary for me to deal exhaustively with the second, but I may observe that, if a company's history of trading has been that of a finance company (as opposed to an investment company), the fact that in two periods, while carrying on this same type of business, it makes losses on its stock and share dealings and can only bring in on the credit side dividends and interest on its investments, does not seem to me of itself to effect a change in the character of the company. My Lords, I would allow the appeal.

VISCOUNT MAUGHAM (read by LORD MACMILLAN). My Lords, this appeal raises a point with a deceptive appearance of simplicity as to the true construction of a few ordinary words contained in s. 20, sub-s. 1, of the Finance Act, 1936. What in that sub-section is the true meaning of the sentence " companies . . . . the income whereof consists mainly of " investment income ? " There has been a difference of opinion as to the answer in the Court of Appeal and there is a difference of opinion in your Lordships' House, and I will readily admit that the question is one of considerable difficulty. I shall, therefore, express my view with great deference to those who have held or hold a different one and with more elaboration than I should otherwise have thought necessary.

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Viscount Maugham

The facts are contained in the case stated, and the relevant sections of the various Taxing Acts have also been cited, and I do not think it is necessary for me to repeat them. The appeal is against a direction made on the appellant company for the year of assessment, 1938–39, under the provisions of s. 21 of the Finance Act, 1922, as extended by the provisions of s. 20 of the Finance Act, 1936. On April 1, 1938, the appellant company passed a resolution for winding-up. The question is whether, at that date, it was an "investment "company" within the meaning of s. 20 of the Finance Act, 1936, and that depends on whether its income "consisted "mainly of investment income." If it was an "investment "company" within the meaning of that section at the date of the commencement of the winding-up, then (under sub-s. 6) the actual income of the company from all sources since that date is deemed to be the income of the members for purposes of sur-tax. It should be noted that the sub-section is no longer law: see Finance Act, 1927, s. 31, and Finance Act, 1936, s. 35.

It is not in dispute that the company was one to which s. 21 of the Finance Act, 1922, applies. The direction of the commissioners was clearly made on the footing that the company was an "investment company." The main question being whether that is correct, two points were raised below by the appellant company and were argued before your Lordships. The first was that on the facts of the case the commissioners were not entitled as a matter of law to find that the appellant company was an investment company and that their decision had been arrived at by examining only the period of fifteen months immediately preceding the date of liquidation, whereas they should have taken into account also the accounting periods prior to the period of fifteen months. The second was that the word "income" in sub-s. 1 of s. 20 of the Finance Act, 1936, means total income from all sources, and that, as the appellant's trading losses in the period selected by the commissioners for review exceeded its investment income for the same period, it had no total income from all sources for that period, and, consequently, could not be brought within the terms of the definition of "investment company." Mr. Tucker, for the appellant, sought to raise another point, which, however, was not raised below or before the commissioners, and sought for the first time to dispute the view that all the investment income of the company was "unearned income" within the meaning of s. 14 of the Finance Act, 1918. Your Lordships, however, took the view that such a contention was not now open to the appellant.

My Lords, in approaching the question of the meaning of the words in s. 20, sub-s. 1, of the Act of 1936, it is necessary to begin the inquiry by observing that Part II of that Act (which relates to income tax and contains s. 20) has to be construed as one with the other Income Tax Acts: see s. 35, sub-s. 2. We must, therefore, bear in mind that sur-tax (like the old super-tax) is payable by a person on his total income from all sources estimated in accordance with the provisions of the Income Tax Acts: see Finance Act, 1918, s. 5 and s. 38, sub-s. 2, of Finance Act, 1927. He is, accordingly, entitled to the benefit of s. 34 of the Income Tax Act, 1918. It was, no doubt, thought obvious that you could not truly ascertain, still less could you justly tax, the total income of an individual for the purposes of an additional duty of income tax without deducting a loss sustained by him in any trade, profession, employment or vocation or in the occupation of lands as mentioned in s. 34. I will add that, speaking generally, it is true to say that "income," as the word is used in the Income Tax Acts, refers to a balance of annual profits and losses made or sustained by a person, always remembering that it is not intended to tax capital. The five schedules, A, B, C, D and E, and their respective rules were designed as convenient machinery for taxing in the hands of an individual every kind of property yielding income: see *London County Council* v. *Attorney-General*, per Lord Macnaghten (1). The word "income" is sometimes expressly applied in relation to income chargeable under a particular schedule, but in other cases it is not infrequently found in the Acts as meaning "income from all "sources" without the addition of the latter words.

Super-tax, like sur-tax, was always leviable on individuals and not on companies or societies. It was not till the year 1922 that the legislature (by the Finance Act, 1922) thought it expedient to exact super-tax on the undistributed income of certain companies "with a view to preventing the avoidance "of the payment of super-tax through the withholding from "distribution of income of a company which would otherwise "be distributed": see the opening words of s. 21 of the Finance Act, 1922. The section leaves it to the Special Commissioners to decide whether the company has distributed

(1) [1901] A. C. 26, 35, 36.

a reasonable part of "its actual income from all sources" for the period in question, having regard not only to the current requirements of the company's business, but also to such other requirements as may be necessary or advisable for the maintenance and development of that business. Subject to that important provision, the commissioners may in an appropriate case direct that "the said income of the company" shall for purposes of assessment to super-tax *be deemed to be the income of the members* and the amount is to be apportioned among them (sub-s. 1 of s. 21). The super-tax chargeable is then to be assessed on the members in the name of the company and—unless the members elect to pay the tax—it must be paid by the company (sub-ss. 2 and 3 of s. 21). The Crown makes no question as to the meaning of the words "actual income "from all sources" of a company. It is expressly provided in sch. I, para. 6 (to the Act of 1922), that, in computing its income from all sources, the income from any source shall be estimated in accordance with the provisions of the Income Tax Acts relating to the computation of income from that source, computed, however, by reference to the income of the year or period in question. Whether because of this provision or on some other ground it is admitted that s. 34 of the Act of 1918 must apply to the computation of "the actual income from all "sources": see also ss. 5, 8 and 9 of the same schedule.

Two methods of evading sur-tax were discovered in due course. One was in connexion with certain loan creditors of a company, who received out of the income of the company moneys in or towards the redemption, repayment or discharge of their loans. The other was by the device of holding up the distribution of dividend and then at a suitable time putting the company into liquidation and distributing the assets in the liquidation with the result that the shareholders would escape sur-tax. It was in these circumstances that the legislature passed into law the section which is now under consideration. Section 20 of the Finance Act, 1936, begins with what is in effect a definition of "investment companies" as follows:—"(1.) The following provisions of this section shall have effect "as respects companies (hereafter in this section referred to as "'investment companies') the income whereof consists mainly "of investment income, that is to say, income which, if the "company were an individual, would not be earned income as "defined in sub-s. 3 of s. 14, of the Income Tax Act, 1918." There followed four sub-sections as to certain loan creditors of companies described as " investment companies " to which s. 21 of the Finance Act, 1922, was applicable. These provisions applied to such companies as going concerns. Then came sub-s. 6, under which the present case arises :—" Where, " whether before or after the passing of this Act, an order has " been made or a resolution passed for the winding up of an " investment company to which s. 21 of the Finance Act, 1922, " applies, the following provisions shall have effect : (*a*) the " *actual income of the company from all sources* [my italics] since " the date of the order or resolution shall, for purposes of assessment to sur-tax, be deemed to be the income of the members ; " (*b*) the Special Commissioners shall from time to time by " notice in writing to the liquidator direct that the amount of " that income for the year or period specified in the notice " shall be deemed for those purposes to be the income of the " members for that year or period, and the amount thereof " shall be apportioned and sur-tax assessed and charged " accordingly ; (*c*) the provisions of the said s. 21 and any " provisions of this or any other Act relating thereto shall, " with any necessary modifications, apply in relation to any " such directions, apportionments and assessments as they " apply in relation to directions, apportionments and assessments under sub-s. 1 of the said s. 21."

It is agreed that " the actual income of the company from " all sources " since the liquidation must be estimated for the purposes of this sub-section after deducting losses on income account, but it is contended on behalf of the respondents that the words " companies . . . . the income whereof consists " mainly of investment income " contained in the definition above set forth do not permit of any such deduction. The result in the case under appeal, according to that view, is that we must disregard the fact that the company in the twelve months to December 31, 1937, made a loss on its trade of 412,464*l*., and in the three months thereafter to April 1, 1938 (the date of liquidation) made a trading loss of 72,202*l*. There were gross taxed dividends on the company's investments of 82,145*l*. and 11,668*l*. for the two periods mentioned. The income of the company, according to the commissioners, therefore, is mainly investment income, the company is an " investment " company," and sub-s. 6 (*c*) of s. 20 must necessarily apply in the winding-up. That, if correct, is a strange result, for it is apparent that the company could not have distributed any dividends whatever in either of the two periods. Assuming the section to be one of a penal nature, a lex poenalis, it is a little odd to find it applied in cases where there is neither delictum nor maleficium. Such, of course, may be the result of the words used, but, for my part, I am not disposed to construe the words in the definition of investment companies in such a way as to create or to add to obvious injustice unless I am compelled by reasonably clear words so to do. It is important to note at the outset that the words " the income thereof " in the definition plainly must mean " the income thereof from all sources." They cannot mean the income assessed under some of the schs. A, B, C, D and E, and not under others. The sub-section is silent as to any such discrimination. The income of a company, in the absence of qualifying words, must mean the whole of its income, i.e., its income from all sources. If I correctly understand the argument on behalf of the respondents, this is not in dispute. Of course, the word " income," if not found in Income Tax Acts which have to be read as one, might refer to the income of the company, and, of course, the whole income ascertained according to ordinary commercial principles approved by law, but in the place where the words in question are found they must, I think, refer to income computed according to income tax rules. The question then arises whether there is any real difference between the words " the actual " income of a company from all sources " and the words " the " income of a company " where the words " from all sources " are plainly to be implied. Is there any magic in the word " actual ? " If it means " other than notional," that also, I think, must be implied in s. 20, sub-s. 1.

My Lords, I have come to the conclusion that the words relating to the income of the company in s. 20, sub-s. 1, have the same meaning as the words " actual income from all " sources " in s. 21, sub-s. 1, of the Finance Act, 1922. The two sections, I repeat, have to be construed together as if they were contained in the same Act. After all, we are ultimately concerned merely with sur-tax payable by shareholders. We are dealing with a tax which is essentially chargeable on the total income of individuals, but not on something which must be more than that income as the word is generally used. It is not reasonable to suppose that by the words as to actual income in s. 20, sub-s. 1, of the Act of 1936 it was intended to disregard the circumstance that for dividend purposes income losses must be deducted from other income before dividends are paid or to tax shareholders of companies for sur-tax in cases where they have already paid sur-tax on all the dividends which the company could properly have paid out of the income of the company. Losses on income account must be deducted, since, generally speaking, a limited company cannot pay dividends out of capital, and the directors and auditors must necessarily have regard to trading losses before declaring dividends. The proposition is a commonplace of company law. To disregard it is to travel on a road to ruin. One should not lightly assume that the legislature is contemplating that the income of a company should be calculated on the footing that an illegal course is being followed.

In an endeavour to make my next observations clear, I shall describe the " income " of the company in the place where the word first appears in sub-s. 1 as " the income A " without at first any assumption as to what that word means, and I shall call income of the company which is not " earned income," as defined, as " the income B." The sub-section then tells us that if the company is one of which the income A " *consists mainly* " of the income B, then the company is an investment company. Obviously, the income B (if it exists at all) is part of the income A. Now, s. 20 of the Act of 1936 consists of amendments of s. 21 of the Finance Act, 1922. It relates both to investment companies within that section which are going concerns and also (sub-s. 6) to cases where an order has been made or a resolution passed for the winding-up of investment companies " to which s. 21 of the Finance Act, 1922, applies." That section, however, as I have pointed out, imposes super-tax on the shareholders on the footing that income from all sources which might have been distributed as dividends has been held up, and shows quite clearly that the income so distributable must be calculated after deduction of losses under s. 34. I am of opinion that this same method must be used in applying sub-ss. 2, 3, 4 and 5 of s. 21 of the Act of 1936 to persons defined as "loan creditors." These provisions are of a complicated character and I cannot discuss them here. (A brief account of them will be found in Konstam's Law of Income Tax, 9th ed., p. 310.) The language of sub-s. 2 seems to me to point clearly to the conclusion that the opinion I have expressed is correct. The proviso as to distribution of a reasonable part of the actual income is framed on the assumption that losses have been already deducted, and I have not heard any reason for supposing that the legislature, when it passed provisions for treating payment of certain loans as distributions of income

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(for purposes of sur-tax), was seeking to alter the provisions of s. 21 of the Finance Act, 1922, as to deduction of losses under s. 34. If my view is correct as to sub-ss. 2 to 5 of s. 20 of the Act of 1936, then the definition in sub-s. 1 must necessarily be construed in the way I have above suggested, and it will necessarily apply to sub-s. 6, which relates, as I have said, to the liquidation of investment companies. Prima facie, then, I am of opinion that the word income, where it is first found in the section, means actual income of the company from all sources ascertained in accordance with the provisions of the Income Tax Acts.

Is there, then, some sufficient reason for coming to another conclusion? It is true that in several instances where the taxing Acts wish to refer to income "from all sources" it uses those or equivalent words. Sub-section 6 of the section now under consideration is an example, but it is not very difficult to see why the draftsman added the words in the sub-s. 6 since he was dealing with a conception hitherto unknown under the taxing Acts, namely, with what is described as the "actual income" of a company in liquidation which might not be carrying on any business at all and would not be taxable for income tax under the well-known sections and rules. The words "from all sources" are, I think, used ex abundanti cautela. In any case, I am not prepared to attach great weight to the argument that when in the welter of legislation relating to income tax and sur-tax we sometimes find additional words used to give a precise meaning to the word "income," a similar meaning may not be given to the word without those additional words.

There is, however, an additional consideration in favour of the prima facie view above suggested. So far, I have not mentioned the question of the period of time which must be looked at for judging whether at the relevant date (which here must be the date of liquidation, April 1, 1938) the income A of the company consists mainly of the income B—which, no doubt, means that income B is more than half the amount of income A. The word "income" plainly has no meaning at all where the amount of it is concerned unless we add the factor of time. I attach some weight to the circumstance that the sub-section uses the present tense "consists" and says nothing as to the length of time during which the income has been received by the company. I cannot think that the definition is framed so that a company may be "an investment company," say, in January, when its trading business is going badly, but it is not an investment company, say, in March, when its trading business has recovered. A few pounds one way or the other may make all the difference. I will add that, if losses on income account are to be disregarded, the company might well be an investment company the day after a large loss though it had not been one on the previous day or for many years before. The alternative, and I venture to think the more reasonable, view is that the words indicate companies of a particular type or character, judged, no doubt, by the kind of income which they have normally received. If the investment income (B) has constituted a major part of the total incoming flow during a period sufficient to enable a fair judgment to be formed of the character of the company, then the company is stamped as an "investment company" with the consequences mentioned in the Act; and if the company goes into liquidation, the actual income "from all sources since "the date of the order or resolution" (for here we get the period mentioned) must for the purposes of assessment to sur-tax be deemed to be the income of the members. If the argument for the Crown is right the result, as pointed out, may depend on a mere accident. The company may have distributed every penny of its available profits during the period in question, and, indeed, in every year since its incorporation. It may have "held up" nothing. That, it is said, makes no difference. We are concerned, it is contended, with a mere question of arithmetic. The income A (but without regard to trading losses) during a period unnamed in the Act but selected without guidance from the Act by the commissioners must be compared with the unearned income B. If the income B exceeds half of the income A, the consequences follow mentioned in the section. The Act is not concerned with justice or equity or with ascertaining the true nature of the company's activities. Well, if the Act says so, it must be so, but, if the language used permits of another interpretation with a more rational result, my view is that we should adopt it.

My Lords, with all respect to those who think otherwise, my opinion is that sub-s. 1 points to the character of the company being ascertained by the nature of its income during a period sufficient for the ascertaining of the real nature of its business and, as I have pointed out, without regard to the question whether the company is or is not in liquidation. The commissioners are not tied to any particular period and are certainly

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not confined to the last year of assessment to tax. The commissioners took a period of fifteen months. In the case before us (where the company has not changed its mode of business) I think it was wrong in law to take a period of great losses in trade owing to enormous depreciation in the trade which was being carried on without also considering the results of the preceding periods. It would not be right to lay down any rigid rule, for every case of the kind must depend on the precise circumstances which bear on the matter to be determined. I am content in this case to say that I think it was wrong in law not to have regard to the trading income of the company for the twenty-one months to December 31, 1936, which amounted to no less than 633,150*l.*, to say nothing of the trading income for the three preceding years. If these periods or the first period alone is looked at, the inevitable conclusion must be that the company was not an "investment company" within the section.

I must add that, in my opinion, sub-s. 1 of s. 20, now under consideration, does not apply to a case where the company's income from all sources amounts to nil as was here the fact. I have above given my reasons for the view that on the true construction of sub-s. 1 the company's income was, in fact, nil, and, if that is correct, it affords a second reason for the conclusion that the commissioners were wrong in the decision at which they arrived and that the direction they gave was invalid. It cannot, I think, be a fair use of language to say that a non-existent income (the income A) "consists mainly "of investment income." My Lords, on the above grounds I think the appeal should be allowed, with the usual consequences.

LORD ATKIN (read by LORD PORTER). My Lords, I have had the advantage of reading in advance the opinion which has just been delivered by my noble friend, Lord Maugham, and I agree with his conclusions and the reasoning by which he reaches them. I find it only necessary to deal generally with the points raised in the case.

It seems to me important to bear in mind that we have to deal with a statutory definition of an investment company, contained in s. 20, sub-s. 1, of the Finance Act, 1936. Why it should be styled by one of the lords justices (1) a "label" I cannot think, unless the conception of a definition was considered dangerous to the conclusion about to be reached.

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(1) [1943] K. B. 345, 353.

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It is a definition with a genus "company," and a differential "mainly investment income," and the sole question is whether the company in question, when it went into liquidation, was an investment company as so defined. Now, it has to be noted that the definition cannot be applied merely by considering the position of the company at any arbitrary date. Whether the income of a company is mainly investment or mainly earned cannot be ascertained in the case of a trading company such as this admittedly is until the close of the trading year in which the earned profits, if any, would be ascertained. It is, therefore, obvious that it is only in reference to yearly results that the definition can be applied. The language used is entirely appropriate to a logical definition of a class or species of company. Does its income consist mainly of investment income? Is one of its attributes mainly investment income? In the case of a company whose known business is trading in securities, which has for several years made large profits in trading followed by one year, while still trading, of serious losses, I cannot imagine anything more unscientific than the process of arriving at a conclusion by examining the phenomenon of a single, and, apparently, exceptional, year. I eliminate the quarter of the year 1938 as adding nothing of value. Of course, if it were established that in the course of the last trading year the company had abandoned its trade, different considerations would apply, but in the present case the company not only continued to trade in the last year, but made substantial trading profits on its actual transactions for the year, over 80,000*l.*, considerably in excess of its income from "investments." It is only because the stock in trade with which the company had not traded during the year had immensely depreciated by the end of the year that the vast trading loss for the year was arrived at. I think, therefore, that the application of the definition requires the examination of the company's activities over a period of certainly more than one year, and that there was no evidence to support their finding that in April, 1938, this was an investment company. The opposite view that a company, while still continuing its ordinary trading, may be an investment company one year and a non-investment company the next, popping in and out of the inland revenue pigeon holes as trade was bad or good, seems to me inconsistent with the language used and from a business point of view to be deprecated.

Mr. Tucker, for the appellants, sought to raise before this

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House for the first time the point that the whole of the investment income was, in fact, earned income as it was the direct result of the trading operations of the company who in the course of their trading bought and paid for the very dividends which are sought to be contrasted with the earned profits. It was obvious that such a point required an examination of the facts of the trading which the commissioners were never invited to make, and that the point was made too late. I express no opinion about it except to say that, in deciding the first point, I have found it difficult to eliminate from consideration, though I think I have succeeded, the very obvious fact that much of this so-called investment income must, in fact, be the product of trading, bought and paid for in the course of trade. On such an issue it would seem difficult to distinguish between the purchase of a share-cum-dividend, and the purchase of a cow in calf. However, the effect of such considerations on this section must remain open.

On the question of income I agree with my noble friend that to predicate of a company which makes a loss of 400,000*l.* and receives dividends of 80,000*l.* that it has an income of 80,000*l.*, appears to be a misuse of ordinary language. I cannot agree with the suggestion of the learned revenue judge that, if a man receives a salary but makes a loss in passing equivalent to the salary, his income could be said to be the amount of his salary. Assume as we may to test the question that he has no other resources but his salary, the end of his trading year would leave him penniless. Would he still say, though I have an income of 2,000*l.* a year, in fact I am penniless ? In my opinion, for the reason given by my noble friend, income in the definition means a positive balance of profits and gains for the year, and in the present case the company had no income in the relevant period. I agree that the appeal should be allowed.

LORD RUSSELL OF KILLOWEN (read by LORD PORTER). My Lords, the devices resorted to by people who wished to evade liability for sur-tax were many and ingenious. In 1922 the Finance Act of that year sought to defeat one of those devices. By s. 21 it was provided that where it appeared to the Special Commissioners that a company, to which the section applied, had not distributed to its members a reasonable part of its actual income from all sources for any accounting period in such a manner as to render the distributed amount liable to be included in the sur-tax returns of the members, the commissioners might direct that, for the purpose of assessment to sur-tax, the company's income for the period should be deemed to be the income of the members and charged with sur-tax accordingly. This provision, however, proved capable of evasion by the expedient of putting the company into liquidation and maintaining it in that condition. A company in liquidation can make no distribution of its income as such. The provisions of the Finance Act, 1922, s. 21, had no operation in regard to income arising or accruing to a company after the commencement of its liquidation. This situation was dealt with as regards certain companies to which s. 21 of the Act of 1922 applied, by s. 20 of the Finance Act, 1936. That section applies to companies which answer the terms of a particular definition, viz., " companies the income whereof consists " mainly of investment income, that is to say income which " if the company were an individual would not be earned " income as defined in sub-s. 3 of s. 14 of the Income Tax " Act, 1918." Those companies are referred to in s. 20 of the Act of 1936 as " investment companies." The provision of the section which is relevant to this case is sub-s. 6 (*a*). It runs thus : " (6.) Where, whether before or after the passing of this " Act, an order has been made or a resolution passed for " winding-up of an investment company to which s. 21 of the " Finance Act, 1922, applies, the following provisions shall have " effect :—(*a*) the actual income of the company from all " sources since the date of the order or resolution shall for the " purposes of assessment to sur-tax be deemed to be the income " of the members." The question which we have to decide can now be stated. Was the appellant company, when it went into liquidation, a company the income whereof consisted mainly of investment income as defined ?

I need not repeat the particular facts of this case. It will be sufficient if I recall that the appellant company is a company to which s. 21 of the Act of 1922 applies, and that it is conceded that the income which it received in the shape of interest and dividends was investment income as defined. My Lords, I have no hesitation in answering the question in the affirmative.

It was contended on behalf of the appellant company that the words " the income whereof " meant the income as computed for income tax purposes, and that, since the trading losses in the fifteen months immediately preceding the liquidation exceeded the investment income received during that period, the income of the company at the commencement of the liquidation was nil, with the result that the company did not comply with the terms of the definition, and that, therefore, sub-s. 6 did not apply to it. I cannot accede to this argument. I see no reason for assigning this highly technical and artificial meaning to the word "income" in the context in which it occurs. That context is not a taxing provision. It is merely a definition clause stating the test which has to be applied for the purpose of ascertaining whether a company is one to which the provisions of the section are to apply. In a taxing clause one might well expect a reference to income to be a reference to income computed for the purpose of the taxation. That is exactly what is found in sub-s. 6 which is a taxing provision, and which uses the well established phrase "actual income of the company from all sources." To my mind the contrast is eloquent and conclusive. Further, the frame of the definition clause indicates to my mind that a comparison is to be made between the company's investment income as defined and the company's other income with a view to ascertaining whether the investment income as defined does or does not preponderate. I agree with the view expressed by du Parcq L.J. in the following words (1): "But, in my "opinion, s. 20, sub-s. 1, of the Finance Act, 1936, requires us "to look, not at the aggregate income, but at two categories of "income (1.) earned and (2.) everything that is not earned, and "to compare them. If under category (1.) we find a loss, and "under category (2.) a profit, that is for this purpose immaterial "the object of the section being to classify a company according "to the character of its income from various sources, and not "to arrive at the true aggregate of its income." Nor can I agree with another suggestion, viz., that the words "consists "mainly" should be read as meaning, "normally consists "mainly." There is nothing to justify us in adding to the provision this notion of normality. Sub-section 6 imposes as a test the existence of a state of affairs at a given point of time, not what was the normal state of affairs over a period of time.

It was contended, however, that the appeal should succeed on another ground, viz., that before the commissioners could decide that at the date of the liquidation the appellant company was an investment company within the definition they were bound to consider the state of affairs in relation to the company's income over a reasonable period of time before the liquidation; that the commissioners had selected a period of only fifteen months which they had treated as conclusive without considering whether or not it was a reasonable period; and that the period so selected was both in fact and in law an unreasonable period. I see no valid ground for the suggestion that the commissioners treated the period chosen as conclusive and omitted to consider whether this period of fifteen months was reasonable or not. There is nothing in the case stated to justify this allegation of failure in their duty. They rightly treat the question what is a reasonable period as a question of fact depending on the circumstances of each case, and they accept the Crown's contention that the circumstances of this case are sufficient to bring this company within the section. Consider the circumstances in this case. The Company, by going into liquidation, put an end to its business of buying and selling stocks and shares. It could never again earn any trading income. Nor had it in its last complete financial year before the liquidation earned any trading income. Nor had it earned any trading income in the three months which intervened between the close of its last financial year and the commencement of the liquidation. During all that time its only income consisted of income from investments. In these circumstances it was, in my opinion, reasonable and right to take those fifteen months as a period proper to be considered in answering the question whether this company, when it went into liquidation, was a company the main income whereof consisted mainly of investment income as defined.

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(1) [1943] K. B. 345, 354.

In my opinion, the commissioners came to a right decision, and I feel a real difficulty in seeing how a different view can prevail without departing in some way from the words of the sub-section and substituting a different test from that which it prescribes. The case fits exactly into the words used if they are read without gloss or addition. The appellant company comes under the special provisions of sub-s. 6, not because it was an investment company in the general sense of those words (which it was not), or because of any failure on its part to distribute its income while it was a going concern (which is a matter with which sub-s. 6 has no concern), but because it comes within the statutory definition of what constitutes a company to which (among other provisions) the provisions of sub-s. 6 are to apply. The target of that sub-section is the post-liquidation actual income from all sources of every company which answers the definition in sub-s. 1, and to which s. 21 of the Finance Act, 1922, applies. That income, which would otherwise be payable as capital in the liquidation, is for the purposes of assessment to sur-tax to be deemed to be the income of the members. I agree with the judgments of Macnaghten J. and Goddard and du Parcq L.JJ., and would dismiss this appeal.

Lord Porter. My Lords, this case involves two complicated and difficult points of law, but in the end the result depends on the true construction of s. 20 of the Finance Act, 1936. Sub-section 1 of that section is worded as follows: "The following provisions of this section shall have effect as "respects companies (hereafter in this section referred to as "'investment companies') the income whereof consists mainly "of investment income, that is to say, income which, if the "company were an individual, would not be earned income "as defined in sub-s. 3 of s. 14, of the Income Tax Act, 1918." The sole question in the case is whether the appellant company is an investment company as so defined, and two points are taken on its behalf.

It is said that :—(i.) Considering all the circumstances, its income did not, at the material time or times, consist mainly of investment income, i.e., of income which, in the case of an individual, would be classified as unearned. (ii.) In fact, it had at the material time no means at all, and, therefore, it could not be said that its income consisted mainly of anything. The ultimate question is the same in either case, viz., whether the appellant is an investment company, but the approach is different. To determine the first point, it must be accepted that there is an income, and one must then discover of what it consists at the material time. The important factor is to ascertain what is the material time and what (if any) period must be taken into consideration in deciding whether the income is or is not mainly investment income. To determine the second point, it has to be conceded that the moment of time at which one must look to discover of what the income consists is either the moment of liquidation or that taken by the commissioners, viz., the last year and three months. Admittedly the company's income up to that time was not mainly investment income. Thereafter the loss incurred in its trading greatly exceeded any sums derived from the interest and dividends on its holding of stocks and shares, and, accordingly, it claimed and obtained repayment of the tax deducted from them. The result, therefore, was that, if the company's income be regarded as consisting of the combined product of its trading activities and of the sums received as interest and dividends on its stocks and shares, it had made a loss and not a profit in respect of the last fifteen months of its life before going into liquidation.

I propose, with your Lordships' permission, to deal with the two questions in the order in which I have stated them, but, as will appear, I find it unnecessary, having regard to my view on the former, to come to any conclusion on the latter. In order that the section may apply, the income of the company must consist mainly of investment income. If it has to be ascertained whether income is mainly investment or non-investment income, the income referred to must be capable of including both. Both must be taken into consideration and the one compared with the other, but there still remains to be decided the time at which and the period over which that comparison has to be made. Was, then, this company's income mainly investment income? Undoubtedly, at the moment at which the liquidation began it was investment income, and it was urged on us that we should look neither forward nor backward but only at that moment. Indeed, it was contended that, if at that moment a company had ceased to do profitable business even for a short time and held no investments except government stock the income of which accrued de die in diem, its only relevant income was that derived from the government stock. Neither the past nor the future must be looked at. The only question was whether there was any other income at the moment of liquidation. Alternatively, it was said, you must take the income of the preceding year of assessment or such further time as, in the opinion of the commissioners, gives a true picture of the source from which the company's income is derived.

The difficulty of the first suggestion is that it takes account only of income accruing from moment to moment and disregards even that which would normally be earned by the investments which the company holds. If, for example, the illustration given in argument for the respondents is varied and the company be supposed to hold, not government stock, but shares on which no dividend had been declared, the company's income would be nil, with the result that, however long it had ceased to trade and however large its holding of shares, it would not be an investment company as defined in the section. I cannot think that this is correct or that its members would escape liability for tax on this assumption. The second contention can, perhaps, best be dealt with by taking the suggestion most favourable to the respondents, viz., that, the period to be considered being a question of fact and the commissioners having determined as a question of fact that the preceding full year and the succeeding broken quarter were the proper period, your Lordships would not interfere with their finding. No doubt, when a company goes into liquidation the circumstances may be such that it is proper to have regard to a short period only of its previous activities, and, if I saw any ground for distinguishing between the period before January 1, 1937, and that after that date, I should think the decision of the commissioners ought not to be disturbed, but I see no facts on which such a distinction could be drawn. As I read paras. 9 and 10 of the case, the commissioners accept the argument that the fact that for the fifteen months before the company went into liquidation the appellant had been drawing an income from investments only was conclusive of the case. The previous history of the company or the fact that it continued to trade until the last moment did not weigh with them, nor, in their view, need those facts be taken into consideration. It was enough that for fifteen months it had no other income. I do not accept this view. In every case I think that the activities of the company as a whole must be looked at. Of course, if it be found that there has been a definite change in the type of business carried on or in the method of carrying it on so that the income of the company is thereafter derived mainly or entirely either from investment or from non-investment income as the case may be, consideration of the previous earnings of the company may be ruled out, but in the present case until liquidation there was no such change. The company continued to carry on its dealings in stocks and shares as before.

It is suggested that, in taking this view, one is answering the question: Of what does the company's business consist, not "of what does its income consist?" whereas the Act poses the latter, and not the former, question. If the position at the moment of winding-up is alone to be regarded, such a criticism is justified, but, unless one adopts that view, some period of time must be taken into consideration, and I can see no reason for confining the enquiry to the company's income during the previous year or fifteen months. The section does not say of what does the income consist, having regard to the position during the previous completed income tax year or during that period and any broken period thereafter. It inquires simply of what does the major portion of the income consist, and that, I think, obliges one to look at the income as a whole, subject, of course, as I have said, to any change of business in the course of the company's career. So regarded, the income of this company mainly consists of non-investment income. The company's activities were directed to earning profits from its dealings in stocks and shares, and not, except incidentally, to deriving income from the interest and dividends of the stocks and shares in which it dealt. It is true that only eight years' results have been taken for the purpose of enabling a judgment to be formed as to what is the main income of the company, but that appears to be the period selected by the parties as representative of its income during the whole of its existence if that be the material period. At any rate, the respondents have not suggested that they are discontented with it or that any further information would change the result. In their submission, however representative the eight years may be, the commissioners should not have looked, or, at any rate, were not obliged to look, at any period beyond the last fifteen months.

If the section applied only to companies in liquidation there would be greater force in this argument, since it might be said that the income referred to was that which the company was actually receiving at the moment of liquidation and possibly to interest and dividends receivable thereafter, since these latter are income in the hands of the company and recognized as such by sub-s. 6, though they are distributable as capital to its members in the liquidation, but the section does not apply solely to a company which is in liquidation. Sub-sections 2 to 5 inclusive are concerned with companies which continue to carry on business, and it is not until sub-s. 6 is reached that liquidation is mentioned. The chameleon-like quality which might be imparted to a living company in changing from year to year from an investment to a non-investment company or vice versa is, to my mind, at least an odd result of the Crown's contention. The section defines an investment company and where the question arises the proper tribunal has to determine whether a particular company comes within the definition or not. The answer it is true depends on whether one type of income preponderates or not, but not necessarily on whether that type preponderates at a particular moment of time or over a particular period. I prefer to look at the company as having a continuing character and to ask of what does the income of that company consist, having regard to its whole life or such portion of that life as truly represents its character. The income is that of a living entity and should, I think, be representative of its receipts in general and not of those which arise or accrue at a particular point of time or (subject to what I have said about a general change in its methods of business) over part only of its existence. The inquiry as to what its income consists of must be answered with that fact in view, and is, I think, correctly answered in the present case by saying that it mainly consists of non-investment income. Having regard to my view as to the first point, I do not think it necessary to express any opinion on the second, and I must not be taken as having formed any opinion on it. It will be open to argument in any future case where it comes in issue. I am of opinion that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Birkbeck, Julius, Edwards & Co.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

STIRLAND . . . . . . APPELLANT;

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT.

H. L. (E.)*

1943

Dec. 20.

1944

June 21.

Criminal law — Evidence — Cross-examination — Cross-examination of prisoner as to character—Questions as to suspicion of previous crime—Appeal—" Substantial miscarriage of justice "—Criminal Evidence Act, 1898 (61 *&* 62 *Vict., c.* 36) *s.* 1 (*f*)—*Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23) *s.* 4, *sub-s.* 1.

The appellant, on trial for forgery, having put his character in issue and asserted in examination in-chief that he had never been "charged" with any offence, was asked in cross-examination questions suggesting that on a previous occasion he had been "questioned about a suggested forgery" by his former employers:—

Held, that the appellant should have been understood to be asserting that he had never been accused before a criminal court (which is the meaning which the word "charged" bears in s. 1 (*f*) of the Criminal Evidence Act, 1898) and the questions should have been disallowed as irrelevant and unfair, but that since, on the rest of the evidence, no reasonable jury could have failed to convict him, the conviction should stand.

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* *Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT and LORD PORTER.

An accused person may be cross-examined as to any evidence he has given in-chief, including statements as to his record, with a view to testing his veracity or his accuracy, but questions suggesting that he has previously been suspected of a crime are inadmissible unless he has expressly sworn the contrary, since unproved suspicions are not relevant as going to disprove good character.

Rules governing the admissibility of questions suggesting that an accused person has committed another offence, as allowed by s. 1 (*f*) of the Criminal Evidence Act, 1898.

There is no universal rule that a conviction cannot be quashed on the ground of improper admission of evidence prejudicial to the prisoner unless his counsel applied for the trial to be begun again before another jury.

Observations in *Rex* v. *Firth* (1938) 26 Cr. App. R. 148, 153 and *Rex* v. *Wattam* (1941) 28 Cr. App. R. 80, 83, distinguished.

The provision of s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, that the Court of Criminal Appeal may dismiss an appeal if they consider that no substantial miscarriage of justice has actually occurred assumes a situation when a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt convict.

Rex v. *Haddy* [1944] K. B. 422, approved. Observation of Viscount Sankey L.C. in *Woolmington* v. *Director of Public Prosecutions* [1935] A. C. 482, 483, explained.

Decision of the Court of Criminal Appeal sub. nom. *Rex* v. *Stirland* (1943) (29 Cr. App. R. 154), affirmed.

APPEAL from the Court of Criminal Appeal.

The appellant was tried at the Central Criminal Court on October 6, 7, 8 and 11, 1943, before the Common Serjeant, His Honour Judge Beazley, on an indictment containing twelve counts and charging him with forgery committed while in the employment of the British Broadcasting Corporation. In the course of the trial the following questions were asked :—

(*a*.) Mr. French, a witness for the prosecution, was asked in cross-examination and answered : Q. " During the time " Stirland was employed by the corporation, you had no " complaint to make about him ? "—A. " No." Q. " You " found him a loyal and faithful servant ? "—A. " Yes." Q. " You had no reason at all to suspect him. That is right, " is it not ? "—A. " Yes."

(*b*.) Again, a police inspector who was also called for the prosecution gave the following evidence in answer to questions from the appellant's counsel : Q. " He is a man of good " character ? "—A. " Yes, he has not been charged before."

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(*c*.) Further, the appellant went into the witness-box and was asked in-chief : " Have you ever in your life been charged " with any offence whatever ? " to which he answered : No."

As the result of these questions and answers, counsel for the prosecution felt justified in cross-examining the appellant as follows : Q. " Why did you leave the Westminster Bank ? "—A. " For two reasons. The first reason was that I have other " interests outside the bank which the bank did not like, and " they were entirely literary interests, when I came to London. " The second reason was that I had the offer of an opportunity " in London for going in for advertising, and therefore " I resigned from the Westminster Bank and came to London." Q. " May I suggest another reason to you ? Were you " questioned about a suggested forgery ? "—A. " No." Q. " Did you leave after an interrogation about a particular " signature ? "—A. " I did not."

Finally, in re-examination, after explaining that he left the bank because his family expenses necessitated his earning more money than he was receiving as salary, the appellant said : " The suggestion that was made by counsel for the " prosecution is untrue in every particular." Q. " You say " your leaving the bank had nothing whatever to do with " any question of your dishonesty ? "—A. " No. I even had " a reference from the Westminster Bank, which I told you " about this morning." Q. " The bank gave you a " reference ? "—A. " Yes, from the Leeds office." Q. " After " you left the bank ? "—A. " Yes." The appellant's counsel did not object to the questions asked him in cross-examination. In his summing-up the Common Serjeant, referring to these questions, advised the jury to take the appellant as being of good character since there was too much doubt about the matters put to him in cross-examination about his previous life. After an absence of seven minutes, the jury returned a verdict of Guilty on all counts. After the verdict the police inspector, giving evidence about the appellant's previous history, stated that in 1934 two forgeries were discovered at the Westminster Bank, where he was then employed and that he was questioned about the matter by the bank officials and denied all knowledge of it, but immediately resigned his position and left. The Common Serjeant stated that, in his view, the appellant had been perfectly rightly found Guilty and sentenced him to be kept in penal servitude for three years. The appellant appealed to the Court of Criminal Appeal (Viscount Caldecote C.J., Atkinson and Croom-Johnson JJ.) against the conviction and sentence, but the appeal was dismissed on November 29, 1943, the judgment of the court being delivered by Atkinson J. The appellant obtained from the Attorney-General a certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that it was desirable in the public interest that a further appeal should be brought. Accordingly, the appeal was brought before the House of Lords.

Crispin and *Figg* for the appellant. The cross-examination now objected to was wholly inadmissible as being irrelevant to the question of the appellant's guilt of the crime for which he was being tried and as tending to suggest that he had been guilty of another crime, contrary to s. 1 (*f*) of the Criminal Evidence Act, 1898. A prisoner who has put his character in issue cannot be cross-examined on whether he has previously been suspected of another offence: *Maxwell* v. *Director of Public Prosecutions* (1). The questions asked do not go to the appellant's credibility, for when he said he had not been "charged" before he clearly meant charged in a criminal court, but, even though a question may go to a prisoner's credibility, it may not be asked if it tends to show that he has committed an offence other than that with which he is charged. In the present case no more than a suspicion of a previous forgery was suggested. A further point arose, namely, whether there are degrees of putting character in issue so that it can be put in issue on a high or a low level. In the Court of Criminal Appeal Atkinson J. said (2): "If an accused person "chooses to pitch his character as high as this appellant did, "it seems to the court that he cannot object to questions "tending to throw doubt on the truth of that evidence," but when character is in issue it is in issue without distinction: *Rex* v. *Winfield* (3). It is not true that, if an accused person puts his good character high, he is liable to be cross-examined on mere suspicions. These questions being inadmissible, the conviction should be quashed, for no direction by the Common Serjeant to the jury could undo the mischief that had been done. The whole policy of English criminal law is to see that every rule in favour of the prisoner is observed, and, if the rules are broken, the conviction must be quashed: *Maxwell* v. *Director of Public Prosecutions* (4). This is not a proper

(1) [1935] A. C. 309, 321.

(2) (1943) 29 Cr. App. R. 154, 157.

(3) (1939) 27 Cr. App. R. 139.

(4) [1935] A. C. 309, 323.

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case for the application of the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, a point which the Court of Criminal Appeal, having decided that the questions were admissible, never reached the stage of considering. It cannot be said that without these questions the jury must inevitably have found the same verdict: see *Rex* v. *Leckey* (1), and also *Rex* v. *Waldman* (2) decided within one month of *Maxwell* v. *Director of Public Prosecutions* (3). When there had been inadmissible cross-examination of an accused person who was represented by counsel, it is not a condition precedent to the allowing of an appeal by him on that ground that objection should have been taken at the trial. *Rex* v. *Firth* (4), *Rex* v. *Peckham* (5) and *Rex* v. *Ellis* (6) do not go so far as that, and in *Rex* v. *Wattam* (7) Viscount Caldecote C.J. was wrong in treating the authorities as if they did.

Sir Donald Somervell A.-G. and *Scott Henderson* for the respondent. It is conceded that, if an accused person puts his character in issue, there is no way of limiting the matter so that he can be treated as having put it in issue on a high plane or a low plane or any particular plane. In this case, however, the appellant's character was in issue in the fullest sense and the prosecution was entitled to put any question germane to character. Character is not restricted to general reputation and its investigation lets in questions about particular incidents: see *R.* v. *Dunkley* (8). The appellant put himself in a position where he was liable to be asked questions to show that he was a man of bad character, e.g., that he had left his employment at the bank in a hurry in suspicious circumstances: *Maxwell* v. *Director of Public Prosecutions* (9). It is absurd to say that a man cannot have a bad character unless he has been convicted of an offence. A servant who had been dismissed a dozen times by successive employers after money had been missed would have a general reputation for dishonesty. Character is prima facie reputation. *Maxwell* v. *Director of Public Prosecutions* (3) is not an authority that in no case can questions as to suspected offences be admissible. In that case the appellant had been acquitted, and, the suspicion having been thus cleared up, he was entitled to be regarded as innocent.

(1) (1943) 113 L. J. (K. B.) 98, 103.

(2) (1934) 24 Cr. App. R. 204, 208.

(3) [1935] A. C. 309.

(4) (1938) 26 Cr. App. R. 148.

(5) (1935) 30 Cox C. C. 353, 356.

(6) [1910] 2 K. B. 746, 763, 764.

(7) (1941) 28 Cr. App. R. 80, 82.

(8) [1927] 1 K. B. 323.

(9) [1935] A. C. 309, 318, 319.

Moreover, he had not asserted that he had never been charged with an offence, and so the fact that he had been did not go to his credibility. The questions in this case, on the other hand, were relevant as going to the appellant's credibility. The passage in *Maxwell* v. *Director of Public Prosecutions* which says (1): ". . . . the question whether a man has been "convicted, charged or acquitted ought not to be admitted, "even if it goes to credibility, if there is any risk of the jury "being misled into thinking that it goes not to credibility "but to the probability of his having committed the offence "of which he is charged" is hard to reconcile with the earlier passage which says (2): ". . . . if the prisoner . . . . seeks "to give evidence of his own good character for the purpose "of showing that it is unlikely that he committed the offence "charged, he raises by way of defence an issue as to his good "character, so that he may fairly be cross-examined on that "issue." The decision can stand without the former passage. In any event the answers to the questions asked in the present case were not prejudicial to the appellant and there was no substantial miscarriage of justice. Accordingly, this is a proper case for the application of the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907. Further, the fact that no objection was taken to these questions at the trial is a circumstance to which an appellate court is entitled to give full weight.

Crispin in reply. The questions were improper and their admissibility cannot depend on the answers in fact given. *Maxwell* v. *Director of Public Prosecutions* (3), is indistinguishable.

The House took time for consideration.

June 21, 1944. VISCOUNT SIMON L.C. My Lords, the point of law immediately involved is as to the admissibility of certain questions put in cross-examination of the appellant at the trial after he had put his character in issue, but at the end of the argument the House intimated that, whether the point of law raised on the appellant's behalf was well founded or not, no substantial miscarriage of justice could be regarded as having actually occurred, and, consequently, that the conviction should stand.

Apart altogether from the impeached questions (which the

(1) [1935] A. C. 309, 321.

(2) Ibid. 319.

(3) [1935] A. C. 309.

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Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the appellant. When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied. The passage in *Woolmington* v. *Director of Public Prosecutions* (1) where Viscount Sankey L.C. observed that in that case, if the jury had been properly directed it could not be affirmed that they would have "inevitably" come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case. The Court of Criminal Appeal has recently in *R.* v. *Haddy* (2) correctly interpreted s. 4, sub-s. 1 of the Criminal Appeal Act and the observation above quoted from *Woolmington's* case (1) in exactly this sense.

It remains to decide the point of law on account of which the appeal has been brought to this House. The appellant clearly put his character in issue in the course of the trial, and that more than once. It will be observed that the questions by counsel for the prosecution were not put in order to suggest a previous conviction or even a previous charge (if by "charge" is meant a criminal proceeding), but they insinuated that the appellant had left his previous employment under suspicion, whether well- or ill-founded, of dishonesty. The prosecutor, of course, put such questions relying on material in his brief—indeed, after conviction, a chief inspector of police, when asked about the appellant's history, gave information regarding the circumstances in which the appellant left the Westminster Bank which corresponded to the questions put, but this provides no answer to the problem whether such questions were legitimate at the stage when the issue of the appellant's

(1) [1935] A. C. 462, 482, 483. (2) [1944] K. B. 422.

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guilt or innocence of the crime charged was still before the jury. Before your Lordships it was contended that this cross-examination was wholly inadmissible as tending to suggest that the appellant had been guilty of a crime other than that with which he was charged and as being irrelevant to the question of his guilt in respect of the crime for which he was being tried.

The right of a prisoner to give evidence on his own behalf was not conferred until 1898 and is governed by the Criminal Evidence Act of that year. The relevant portion of s. 1 runs thus: " Every person charged with an offence . . . shall be " a competent witness for the defence at every stage of the " proceedings . . . Provided as follows :— . . . (*e*) A per- " son charged and being a witness in pursuance of this Act " may be asked any question in cross-examination notwith- " standing that it would tend to criminate him as to the " offence charged : (*f*) A person charged and called as a witness " in pursuance of this Act shall not be asked, and if asked shall " not be required to answer, any question tending to show " that he has committed or been convicted of or been charged " with any offence other than that wherewith he is then " charged, or is of bad character, unless—(i.) the proof that " he has committed or been convicted of such other offence " is admissible evidence to show that he is guilty of the offence " wherewith he is then charged ; or (ii.) he has personally or " by his advocate asked questions of the witnesses for the " prosecution with a view to establish his own good character, " or has given evidence of his good character, or the nature or " conduct of the defence is such as to involve imputations on " the character of the prosecutor or the witnesses for the " prosecution ; or (iii.) he has given evidence against any " other person charged with the same offence." This House has laid it down in *Maxwell* v. *Director of Public Prosecutions* (1) that, while para. (*f*) of this section absolutely prohibits any question of the kind there indicated being put to the accused in the witness box unless one or other of the conditions (i.), (ii.) or (iii.) is satisfied, it does not follow that such questions are in all circumstances justified whenever one or other of the conditions is fulfilled. Viscount Sankey L.C., in delivering the judgment of the House defined the matter to be decided in *Maxwell's* case as being whether it was permissible in the particular facts of that case for the prosecution to ask the

(1) [1935] A. C. 309, 312.

prisoner (who had put his character in issue) whether on a previous occasion he had been charged with a similar offence, the charge having been tried and having resulted in an acquittal. The House decided that in the circumstances the question was not admissible, for the previous acquittal proved nothing against the accused—"the mere fact of a charge cannot in "general be evidence of bad character or be regarded otherwise than a misfortune" (1)—and moreover the accused had not said that he had never previously been charged so that the question could not be justified as a challenge to the accused's veracity and as seeking to show that he was a person not to be believed on his oath. The question, in the opinion of the House, was, therefore, irrelevant, and at the same time was "likely to lead the minds of the jury astray into false issues" (2), inasmuch as it might suggest to the jury that the accused had committed a similar offence before and, therefore, was likely to have been guilty of the crime now charged against him.

Atkinson J. in delivering the judgment of the Court of Criminal Appeal in the present case (3), thought that there was nothing in the trial which conflicted with the decision in *Maxwell's* case (4) largely because the appellant swore that he had never in his life "been charged with any offence whatever." Therefore, argued Atkinson J., cross-examination about the allegedly suspicious circumstances in which the appellant left the bank was relevant and admissible to disprove his denial that he had ever been "charged." I should agree with the learned judge that, if an accused person, in the witness box makes a statement of fact which the prosecution does not accept, he is liable to be cross-examined on the statement with a view to showing that it is not true, and this applies to a statement as to the accused's past record where he puts his character in issue just as much as to a statement on any other matter. But this is all subject, as explained below, to the judge's discretion to disallow any question which in the circumstances he thinks to be unfair. It is necessary, however, to guard against a possible confusion in the use of the word "charged." In para. (*f*) of s. 1 of the Act of 1898 the word appears five times and it is plain that its meaning in the section is "accused before a court" and not merely "suspected "or accused without prosecution." When the appellant

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(1) [1935] A. C. 319.
(2) Ibid. 320.
(3) (1943) 29 Cr. App. R. 154, 157, 158.
(4) [1935] A. C. 309.

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denied that he had ever been "charged," he may fairly be understood to use the word in the sense it bears in the statute and to mean that he had never previously been brought before a criminal court. Questions whether his former employer had suspected him of forgery were not, therefore, any challenge to the veracity of what he had said. Neither were they relevant as going to disprove good character. The most virtuous may be suspected, and an unproved accusation proves nothing against the accused, but the questions, while irrelevant both to the charge which was being tried and to the issue of good character, were calculated to injure the appellant in the eyes of the jury by suggesting that he had been in trouble before, and were, therefore, not fair to him. They should not have been put, and, if put, should have been disallowed. It must not be forgotten that the judge presiding at a criminal trial has a discretion (as Lord Sankey said in *Maxwell's* case (1)) to disallow questions addressed to the accused in cross-examination if he considers that such questions, having regard to the issues before the jury and to the risk of the jury being misled as to what those issues really are, would be unfair, and the judge's disallowance cannot be challenged on appeal. A question whether the accused, who has put his character in issue, was not suspected of a previous crime of which he was never charged in court, or, if charged, was acquitted, is an example of a case where the judge should intervene. It is true that a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent, but when *Maxwell's* case (2) decided that where the prosecution had enough evidence to indict a man for a crime, but not enough to convict, no questions can be asked about that incident in a later trial at which he puts his character in issue, how can mere suspicion alleged to have been entertained by his previous employer on an earlier occasion be a legitimate topic for cross-examination to credit ?

There is perhaps some vagueness in the use of the term "good character" in this connexion. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to the man's real disposition as distinct from what his friends and neighbours may think of him ? In *Reg.* v. *Rowton* (3), on a re-hearing before the full court, it was held by the majority that evidence for or against a prisoner's good

(1) [1935] A. C. 321.
(2) Ibid. 309.
(3) (1865) 10 Cox C. C. 25.

character must be confined to the prisoner's general reputation, but Erle C.J. and Willes J. thought that the meaning of the phrase extended to include actual moral disposition as known to an individual witness, though no evidence could be given of concrete examples of conduct. In the later case of *Rex* v. *Dunkley* (1), the question was further discussed in the light of the language of the section, but not explicitly decided. I am disposed to think that in para. (*f*) (where the word " character " occurs four times) both conceptions are combined.

The historical development of the English rule that the prosecution, in seeking to prove the crime charged, may not, generally speaking, introduce evidence of the previous bad character of the accused, but that the accused may call evidence in support of his previous good reputation, is difficult to trace. Sir James Stephen in his History of the Criminal Law of England, vol. I, p. 449, has some interesting observations on the subject. See also Kenny's Outline of Criminal Law, 15th ed., pp. 464–467. Stephen points out that before the Norman conquest " the character of the accused decided the " question whether he was to be allowed to make his purgation " by compurgators or was to be sent to the ordeal. In later " times the character of the accused must have weighed with " the jury who acted as witnesses. Under the Stuarts . . . . " evidence was freely given of particular crimes or misconduct " unconnected with the matter in issue, committed by the " prisoner." The earliest instance which Stephen records of evidence being admitted of the prisoner's good character is at the trial of Colonel Turner for burglary in 1664 (2). In an early edition of Russell on Crimes (2nd ed.) published in 1828 (vol. II, p. 703), there is a note stating that " formerly evidence " of the prisoner's good character was admitted in capital " cases only, in favorem vitæ." The rule, however, was later extended to cover any prosecution for positive crime. " The " true line of distinction . . ." said Eyre C.B. in *Att.-Gen.* v. *Bowman* (3) " is this ; that in a direct prosecution for a crime, " such evidence is admissible, but where the prosecution is not " directly for the crime but for the penalty, as in this infor- " mation " (it was an information for keeping false weights), " it is not." By the end of the eighteenth century evidence of good character was constantly admitted. A remarkable instance is provided by the trial of Arthur O'Connor for high

(1) [1927] 1 K. B. 323.
(2) (1664) 6 Howell's St. Tr. 565, 613.
(3) (1791) 2 B & P. 532, *n*.

treason in 1798 (1) where Mr. Erskine was one of a large number of distinguished persons who testified to the prisoner's character for loyalty. Erskine, indeed, in the course of his evidence (2), stated that, with the choice before him of defending Mr. O'Connor or of giving evidence as to his good character, he chose the latter, and the Attorney-General, Sir John Scott, told the jury (3) that "in all doubtful cases, character ought "to have very considerable weight indeed." Cockburn C.J. in *Reg.* v. *Rowton* (4) observes that "although, logically speak-"ing, it is quite clear that an antecedent bad character would "form quite as reasonable a ground for the presumption and "probability of guilt as previous good character lays the "foundation of innocence, yet you cannot, on the part of the "prosecution, go into evidence as to bad character. This "allowing of evidence of good character in favour of the "prisoner to be given, has grown up from a desire to "administer this part of our law with mercy as far as possible. "It has sprung up from the time when the law was according "to the common estimation of mankind severer than it should "have been."

It is most undesirable that the rules which should govern cross-examination to credit of an accused person in the witness box should be complicated by refined distinctions involving a close study and comparison of decided cases, when, in fact, these rules are few and can be simply stated. The following propositions seem to cover the ground. (I am omitting the rule which admits evidence tending to prove other offences where this evidence is relevant to the issue being tried as helping to negative accident or to establish system, intent or the like.) 1. The accused in the witness box may not be asked any question "tending to show that he has committed or been "convicted of or been charged with any offence other than "that wherewith he is then charged, or is of bad character, "unless" one or other of the three conditions set out in para. (*f*) of s. 1 of the Act of 1898 is fulfilled. 2. He may, however, be cross-examined as to any of the evidence he has given in-chief, including statements concerning his good record, with a view to testing his veracity or accuracy or to showing that he is not to be believed on his oath. 3. An accused who "puts his character in issue" must be regarded as putting the whole of his past record in issue. He cannot assert his good conduct in certain respects without exposing himself to inquiry about the rest of his record so far as this tends to disprove a claim for good character. 4. An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: *Rex* v. *Turner* (1). 5. It is no disproof of good character that a man has been suspected or accused of a previous crime. Such questions as "Were you suspected?" or: "Were you "accused?" are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary: see r. 2 above. 6. The fact that a question put to the accused is irrelevant is in itself no reason for quashing his conviction, though it should have been disallowed by the judge. If the question is not only irrelevant, but is unfair to the accused as being likely to distract the jury from considering the real issues and so lead to "a miscarriage of justice" (Criminal Appeal Act, 1907, s. 4, sub-s. 1), it should be disallowed, and, if not disallowed, is a ground on which an appeal against conviction may be based.

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(1) (1798) 26 Howell's St. Tr. 1191; 27 St. Tr. 1.

(2) 27 Howell's St. Tr. 40.

(3) Ibid. 113.

(4) 10 Cox C. C. 25, 29, 30.

A further question was raised in the present appeal which can be briefly disposed of. Atkinson J., in delivering the judgment of the Court of Criminal Appeal (2), called attention to the decision of that court in *Rex* v. *Wattam* (3), where the present Lord Chief Justice quoted the observation of Lord Hewart C.J. in *Rex* v. *Firth* (4), and treated that observation as amounting to a ruling that a conviction cannot be quashed on the ground of the improper admission of evidence prejudicial to the prisoner unless an application is made at the time by counsel for the prisoner for the trial to be begun again before another jury. No such application was made in the present case. I doubt whether Lord Hewart's words require so strict a construction, but, in any case, it seems to me that there cannot be a universal rule to this effect. It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself: see *Rex* v. *Ellis* (5). If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel

(1) [1944] K. B. 463.
(2) 29 Cr. App. R. 154, 158.
(3) (1941) 28 Cr. App. R. 80, 83.
(4) (1938) 26 Cr. App. R. 148, 153.
(5) [1910] 2 K. B. 746, 764.

failed at the time to raise the matter. No doubt, as was said (1) in the same case, the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal, but where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice. There is nothing in the Act of 1898 to suggest that such an objection is necessarily invalid unless taken at the time, and in other branches of the law the right to object on appeal that evidence was inadmissible is not necessarily forfeited by the failure to object when the evidence was given. The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and, if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive.

My Lords, my noble and learned friend LORD RUSSELL OF KILLOWEN, who is not able to be here, has authorized me to say that he concurs in this opinion.

LORD THANKERTON. My Lords, I have had an opportunity of considering the opinion which has just been delivered by my noble and learned friend on the woolsack, and I find myself in complete agreement with it.

LORD WRIGHT. My Lords, I also agree.

LORD PORTER. My Lords, I agree.

Appeal dismissed.

Solicitors for appellant: *J. H. Milner & Son.*
Solicitor for Crown: *Director of Public Prosecutions.*

(1) [1910] 2 K. B. 763.

[HOUSE OF LORDS]

H. L. (E.)*

1944

May 8, 9, 10, 11, 15; June 21.

G. A. CRAMP & SONS, LIMITED. . . APPELLANTS;

AND

FRANK SMYTHSON, LIMITED. . . RESPONDENTS.

Copyright—Literary work—Diary—Tables of general information—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.*1, *sub-s.* 1 *; s.* 6, *sub-s.* 3 (*b*.)

The appellants and the respondents were both publishers of pocket diaries. The respondents complained that the appellants, in a diary published by them, had infringed the copyright in their "Liteblue" diary. The issue published by the respondents in 1932 for 1933 contained the usual diary pages and these were accompanied by pages containing information of the kind usually found in diaries—a calendar for the year, postal information, a selection of "days and dates" for the year, tables of weights and measures, comparative time tables, a percentage table, and the like. In 1938 a former employee of the respondents, then employed by the appellants, copied seven of the tables in the respondents' diary and inserted them in a diary published by the appellants. The respondents brought an action against the appellants alleging infringement of their copyright:—

Held, that copyright was not established, since the commonplace matter of the tables left no room for taste or judgment and their selection did not constitute an original literary work.

Observations on the effect of s. 6, sub-s. 3 (*b*) of the Copyright Act, 1911.

Decision of the Court of Appeal (sub. nom. *Frank Smythson, Ld.* v. *G. A. Cramp & Sons, Ld.*) [1943] Ch. 133, reversed.

APPEAL from the Court of Appeal.

The facts stated by VISCOUNT SIMON L.C. and LORD MACMILLAN were as follows: The respondents, the plaintiffs in the action, were the publishers of a series of well-known and attractive pocket diaries. Among these was one designated the "Liteblue Diary." The preliminary pages of the diary for 1933, prefixed to the blank pages containing spaces for each day's entries, contained, among other matter, (1.) a calendar for the year; (2.) a selection of "Days and Dates" for the year; (3.) inland postal rates; (4.) empire and foreign postage; (5.) equivalents of metric and imperial weights and measures; (6.) lighting-up times; (7.) empire and foreign time-table (i.e., the equivalent time to noon at Greenwich for some thirty places), and (8.) a percentage table (beginning with

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* *Present:* VISCOUNT SIMON L.C., LORD MACMILLAN, LORD ROCHE, LORD PORTER and LORD SIMONDS.

" 10s. in £=50% " and working down to " 3*d*. in £=1¼% "). It appeared from the evidence and from inspection of the tables themselves that the respondents were unable to give any oral evidence directly bearing on the authorship or the work incident to the preparation of this part of their diary. Mr. Frank Smythson, who was responsible for putting out earlier editions of the diaries, was dead and there was no ground for inferring that the preparation of any one of these tables was, in fact, the original work of Mr. Smythson or of anyone representing the respondents. The table of lighting-up times stated that it was " compiled by courtesy of the Automobile Association." The table of equivalents of metric and imperial weights and measures appeared to be taken bodily from Harper's Diary, 1930, or from some source used by both Harper and the respondents. The postal rates presumably came from the Postal Guide, and there was no evidence who extracted or summarized them. The appellants, the defendants in the action, published diaries of a similar character, among them the " Surrey Lightweight Diary " which also contained a number of printed tables. In the appellant's " Surrey Lightweight " Diary " for 1942 there were to be found, among others, seven printed tables which were almost textually identical with seven corresponding tables printed with other matter in the respondents' " Liteblue Diary " for 1933. It was not disputed that, with the necessary calendar alterations and a few minor variations they had been copied from the respondents' diary by one Eckford, who entered the appellants' service, after previously serving the respondents, as diary manager and salesman in 1937, though the appellants knew nothing of this copying. It was further admitted that, if the respondents had any copyright in these seven tables, the appellants had infringed it. An action having been brought by the respondents against the appellants, several matters in dispute were raised and settled in the litigation. The question remained whether the appellants had infringed any copyright which the respondents had in the tables in the " Liteblue Diary " for 1933. Uthwatt J., who heard the action, said, in the course of his judgment : " I cannot see that the selection of lists and tables " and the arrangement of the diary are anything other than a " commonplace selection of gobbets of information and a " commonplace arrangement, neither of which involved any " real exercise of knowledge, labour, judgment or skill. In " my opinion, therefore, the work is not entitled to copyright."

The Court of Appeal (Lord Greene M.R. and MacKinnon L.J., Luxmoore L.J. dissenting) reversed Uthwatt J., and held in favour of the respondents. Their judgment was expressed in an order which declared " that the collection of tables comprised " in the [respondents'] ' Liteblue Diary ' for 1933 and headed " respectively ' Days and Dates ' ' Inland Postal Rates,' " ' Empire and Foreign Postage,' ' Equivalents of Metric " ' and Imperial Weights and Measures,' ' Empire and Foreign " ' Time Table ' ' Sunset Table and ' Percentage Table ' is a " copyright work and that the copyright therein is vested in " the [respondents]." The order further declared that the appellants had infringed the respondents' copyright by printing and publishing in the " Surrey Lightweight Diary, 1942," a collection of seven tables with corresponding headings. The appellants appealed to the House of Lords.

Pritt K.C. and *Gahan* (for *H. C. Leon* on war service) for the appellants. The collection of tables in the " Liteblue " Diary is not susceptible of copyright. The respondents claim that it is an original literary work, but there is no evidence that anyone ever brought any labour, skill or judgment to bear on this compilation. Indeed, obviously this is not a case where labour, skill and judgment were expended. It is impossible to estimate the amount of labour, skill and judgment brought to bear on the matter. If one does not know whether the literary instrument used in this case was a pen or a pair of scissors that is fatal to the respondents' claim. There is no copyright either in the individual tables or in the selection or arrangement. [They referred to *Macmillan & Co., Ld.* v. *K. & J. Cooper* (1); *Macmillan* v. *Suresh Chunder Deb* (2); and *Leslie* v. *J. Young & Sons* (3)]. Even if there is copyright in these tables the appellants are entitled to claim the protection of the Copyright Act, 1911, s. 8, since at the date of the infringement they did not know of its existence and had no reasonable ground for suspecting its existence. Accordingly, the respondents' remedy against them must be limited to an injunction. *Byrne* v. *Statist Co.* (4) and *Pytram, Ld.* v. *Models* (*Leicester*), *Ld.* (5) are distinguishable. The fact that the respondents' diary contained their name as publishers did not, by virtue of s. 6, sub-s. 3 (*b*), raise a presumption that copyright in it existed.

(1) (1923) L. R. 51. Ind. App. 109; 93 L. J. (P. C.) 113.
(2) (1890) I. L. R. 17 C. 951.
(3) [1894] A. C. 335.
(4) [1914] 1 K. B. 622.
(5) [1930] 1 Ch. 639.

Shelley K.C. and *A. L. Stevenson* (for *Aldous* on war service) for the respondents. The collection of tables in the respondents' diary is an original literary work and so the subject-matter of copyright. In this appeal, at any rate, no claim is made for copyright in any individual table, nor is there any claim in respect of the order in which the tables are arranged in the diary. Reliance is placed on the selection, not the collection, and copyright is claimed only in the compilation. The work must be looked at as a whole. What is presented as a copyright work is a "book," a collection of eight tables, a single work, an entity in itself. Some of the tables are original in their form and this enhances the originality of the whole. The crux is whether, on all the evidence, a breach of the respondents' copyright is established. That is an issue of fact. It is not suggested that the appellants are not entitled to print any one of these tables, but they were not entitled to copy the respondents' work. Copying is an essential feature of breach of copyright. Similarity is only evidence of copying. The order of the Court of Appeal is very narrow in its terms and would not prevent the appellants from taking one of these tables worded exactly as it is. It would only prevent a copying of a substantial part of the respondents' work. Seven out of eight tables were copied and that plainly amounts to taking a substantial part. The respondents rely on the following general propositions. In the case of a literary work in order to have a practical copyright: (1.) There must be an author who writes or utters words. (2.) The work must be one to which the Copyright Act, 1911, applies, and by s. 35, sub-s. 1, a literary work includes "compilations." (3.) The work must be "original," which may mean (*a*) that it is not copied from any pre-existing work or (*b*) that it involved sufficient labour, skill and judgment to provide originality—an original expression of thought. The question of merit does not arise. These propositions are supported by Copinger on The Law of Copyright, 7th ed., pp. 40, 41, 45. The evidence in this case establishes that there was sufficient labour, skill and judgment to entitle this collection of tables to copyright. Further, by the terms of s. 6, sub-s. 3 (*b*), the onus of proof rests, not on the respondents to prove that copyright exists in these tables, but on the appellants to disprove it. Copyright is easily assignable and the author may well be dead or inaccessible when an action is brought in respect of his work so that it would be impossible to prove affirmatively that it was original. This

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is the precise situation with which s. 6, sub-s. 3 (*b*) is dealing: see *Hogg* v. *Toye & Co., Ld.* (1). It creates a presumption of copyright, for that is involved in presuming somebody "to "be the owner of the copyright in the work." The effect is that, if a publisher puts in a work in which his name is printed as indicated in s. 6, sub-s. 3 (*b*), and no more evidence is given, he must win the issue of copyright. If in such a case the burden were on the plaintiff to prove originality he would have the almost impossible task of producing evidence that the work was not copied from somebody else. The passage in Copinger on The Law of Copyright, 7th ed., pp. 164–5, dealing with this subsection is not correct. Further, the appellants are not entitled to the protection of s. 8 as innocent infringers. Their production was devised to compete with the respondents' diary, and to do so it must be a good commercial proposition. What is worth copying must be worth protecting.

The House took time for consideration.

June 21. Viscount Simon L.C. My Lords, both these parties were publishers of pocket diaries. A number of disputes between them have been settled in the litigation which has already taken place, and the question that remains is whether the appellants, in inserting certain tables in their "Surrey "Lightweight Diary, 1942," have infringed any copyright that the respondents had in a collection of tables included in their pocket diary known as "Liteblue Diary, 1933." It is not disputed that seven of these tables had been copied from the respondents' diary by one Eckford, who entered the appellants' service (after previously serving the respondents) as diary manager and salesman in 1937, though it is right to add that his employers knew nothing of this copying. If, therefore, the respondents owned any copyright in the compilation of material which was copied by Eckford from their diary, infringement of this copyright by the appellants in their "Surrey "Lightweight Diary, 1942" is not, and cannot be, disputed. The question, however, is whether, having regard to its nature and subject-matter, the compilation to be found in the respondents' "Liteblue Diary," which has thus been copied and made use of by the appellants, should be regarded as matter for copyright. There has been a noteworthy difference of judicial opinion on this issue. Uthwatt J., who heard the action, came to the conclusion that "the selection of lists and "tables and the arrangement of the [respondents'] Diary" were nothing more "than a commonplace selection of gobbets "of information and a commonplace arrangement, neither "of which involve any real exercise of knowledge, labour, "judgment or skill." He held, therefore, that the respondents' work was not entitled to copyright. In the Court of Appeal Luxmoore L.J. took the same view, stating (1) that "the "compilation for which copyright is claimed is nothing more "than a commonplace selection or arrangement of scraps of "information, neither of which involved any real exercise of "labour, judgment or skill." He, therefore, held, like Uthwatt J., that the claim for copyright by the present respondents failed. Lord Greene M.R. and MacKinnon L.J. took a different view. Lord Greene held that the collection of tables prefixed to the present respondents' diary was a compilation which was entitled to copyright and considered (2) it to be established "that there is a sufficient amount of "skill, labour and judgment put into the selection of that group "of tables to attract copyright." MacKinnon L.J. observed (3): "That the defendants slavishly copied the printed matter in the "plaintiffs' book is manifest. The only question, therefore, is "whether the matter so copied is susceptible of being the plain- "tiffs' copyright. The matter copied is information as to various "topics such as the compiler of such a diary invariably prefixes "to the pages of the diary proper. Information of this sort "is, of course, open to all the world as part of the stock of "common knowledge. The compiler of this part of a diary "is set two tasks: first, the selection of the topics, and, "secondly, the expression of the written matter on each "topic." After analysing the nature of the written matter, the learned lord justice observed (4): "What degree of labour "and skill will suffice to create copyright in an original work "must in every case be a question of fact. In the present "case it is near the line . . . . but, in my opinion, the plaintiffs "are entitled to say that they have copyright in the eight pages "of printed matter which the defendants appropriated." In the Court of Appeal, therefore, the decision of Uthwatt J. was reversed by a majority.

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(1) [1935] Ch. 497.

The principles of law to be applied to this issue are not in any doubt. By s. 1, sub-s. 1, of the Copyright Act, 1911,

(1) [1943] Ch. 133, 143.

(2) Ibid 138.

(3) Ibid 139.

(4) Ibid. 140.

copyright subsists under the conditions mentioned in the section "in every original literary . . . . work" and this expression includes "compilations": s. 35, sub-s. 1. Nobody disputes that the existence of sufficient "originality" is a question of fact and degree. Lord Atkinson's observation in delivering the judgment of the Judicial Committee in *Macmillan & Co., Ld.* v. *K. & J. Cooper* (1) lays down the law on the subject in terms which are universally accepted. He said: "What is the pre-"cise amount of the knowledge, labour, judgment or literary "skill or taste which the author of any book or other compila-"tion must bestow upon its composition in order to acquire "copyright in it within the meaning of the Copyright Act of "1911 cannot be defined in precise terms. In every case it must "depend largely on the special facts of that case, and must in "each case be very much a question of degree." Applying this rule to the evidence in the present case, and after hearing full arguments at the Bar of the House, I have reached the conclusion that the respondents' copyright is not established and that the appellants have, therefore, not infringed.

The respondents base their claim to copyright on the selection of these tables to form a combination of information, and the declaration made by the Court of Appeal is "that the "collection of tables comprised in the plaintiffs' Liteblue Diary "for 1933" (other than the calendar), "is a copyright work," and that the infringement by the plaintiffs consists in printing and publishing in "the Surrey Lightweight Diary, 1942" this collection of tables. At the same time, if I understood Mr. Shelley aright, he reserved the right to contend, if necessary, on another occasion that there was copyright in an individual table. Granted that the appellants copied the respondents' tables (and this is not only admitted but is indicated by the almost precise similarity of language), there seems to be nothing that can properly be described as an "original literary "work" in grouping together this information. A summarized statement of the most important of the postal charges, inland, imperial and foreign, is part of the ordinary contents of any pocket diary. There would, indeed, as it seems to me, be considerable difficulty in successfully contending that ordinary tables which can be got from, or checked by, the postal guide or the Nautical Almanac are a subject of copyright as being original literary work. One of the essential qualities of such tables is that they should be accurate, so that there is no question of variation in what is stated. The sun does in fact rise, and the moon set, at times which have been calculated, and the utmost that a table can do on such a subject is to state the result accurately. There is so far no room for taste or judgment. There remains, I agree, the element of choice as to what information should be given, and the respondents contend that the test of originality is satisfied by the choice of the tables inserted, but the bundle of information furnished in the respondents' diary is commonplace information which is ordinarily useful and is, at any rate to a large extent, commonly found prefixed to diaries, and, looking through the respondents' collection of tables, I have difficulty in seeing how such tables, in the combination in which they appear in the respondents' 1933 diary, can reasonably claim to be "original work." There was no evidence that any of these tables was composed specially for the respondents' diary. There was no feature of them which could be pointed out as novel or specially meritorious or ingenious from the point of view of the judgment or skill of the compiler. It was not suggested that there was any element of originality or skill in the order in which the tables were arranged. My own conclusion is that the selection did not constitute an original literary work.

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(1) L. R. 51 Ind. App. 109, 125; 93 L. J. (P. C.) 113, 121.

Mr. Shelley advanced with great pertinacity and ingenuity a subsidiary argument to which I must briefly refer. He contended that under s. 6, sub-s. 3 (*b*), of the Copyright Act, as the appellants had put in issue the existence of the respondents' copyright and as the respondents' diary contained the name of the respondents as publishers, it followed that, unless the contrary is proved, the respondents were to "be presumed "to be the owner of the copyright in the work" for the purposes of proceedings in respect of the infringement of copyright therein, in the sense that not only would the title of the respondents be presumed but also that the existence of the copyright should be presumed also. I do not myself so read the section, for I cannot see that the conditions mentioned in the opening words of para. (*b*) have anything to do with establishing a presumption that a work is copyright, though they obviously have to do with the issue of title. My conclusion agrees with what was said by Uthwatt J. and Luxmoore L.J. and I do not find that either the Master of the Rolls or MacKinnon L.J. indicates an opinion on this point to the contrary. But be that as it may, Mr. Shelley's argument on s. 6 would at best only shift the burden of proof, and, even if I took a different view of the interpretation of s. 6, I should still hold that it was in this case established that no copyright existed. I move that the appeal be allowed with costs.

Lord Macmillan. My Lords, of the issues originally raised between the parties to this appeal there remains for determination by your Lordships only one main question. It is admitted that, if the respondents have any copyright in their seven tables, the appellants have infringed it. The question is whether they have any such copyright.

The ground has been cleared by two important admissions on the part of counsel for the respondents, namely, (1.) that for the purposes of this case the respondents make no claim to copyright in any one of the seven tables taken individually; and (2.) that they make no claim in respect of the order in which the seven tables are arranged in their diary. The sole merit which the respondents claim as entitling them to copyright is represented as residing in the selection by them of the seven tables in question for publication in their diary. They maintain that in choosing these particular seven tables they showed knowledge and skill and expended labour sufficient to entitle the collection to qualify, in the words of the Copyright Act, 1911, s. 1, sub-s. 1, as an original literary work, which by s. 35, sub-s. 1, is defined to include "compilations." Now, I do not doubt that, as the annals of literature show, a high degree of skill and knowledge may be displayed and much labour and judgment expended in gathering from the wide fields of non-copyright material at the disposal of the public specialized collections of extracts designed to meet particular needs or particular tastes, but it must always be a question of degree. Not every compilation can claim to be original literary work even in the pedestrian sense attributed to these words by the law. Thus, to take a familiar example, it has been held by this House that to compile from the official time tables of the railway companies a local time table showing a selection of trains to and from a particular town is not to compose a work entitled to copyright. Such a compilation may be convenient and useful for the inhabitants of that town, but it does not require either such labour or such ingenuity in its preparation as to render it fit subject-matter for copyright: *Leslie* v. *J. Young & Sons* (1).

In my opinion, the respondents, in selecting the seven tables in question for inclusion in their diary, did not bring into existence a copyright work. There is no evidence available to show how or why the particular selection was made, for the original compiler of the series is dead. To my mind, the collection is of an obvious and commonplace character, and I fail to detect any meritorious distinctiveness in it. Everyone expects to find in his pocket diary some useful general information about rates of postage, weights and measures, significant dates and the like. Probably no two series of diaries contain precisely the same collections of tables, for they will vary according to the compiler's ideas as to what is likely to be useful to the purchasers whom he seeks to attract, but there must be a number of items, such as rates of postage, common to them all. The inclusion or exclusion of one or more of the tables constituting the ordinary stock material of the diary-compiler seems to me to involve the very minimum of labour and judgment. As I have said, and as the authorities remind us, the question must always be one of degree and on questions of degree different minds may naturally reach different conclusions. For myself, I should say that, if any compilation could be held to fall short of displaying the qualities requisite to attract copyright, the respondents' collection of seven tables is such a one.

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(1) [1894] A. C. 335.

The view which I have just expressed absolves me from pronouncing on the interpretation to be placed on s. 6, subs. 3, of the Act under which the respondents claimed that there was a presumption in their favour of the existence of copyright. If there were any such presumption I should hold it to have been displaced on the facts, but, as the matter was fully argued, I may say that I should be disposed to agree with the construction placed on the sub-section by Uthwatt J. and Luxmoore L.J. As regards the question of innocent infringement under s. 8 which was also argued, I desire expressly to reserve my opinion whether the Master of the Rolls and MacKinnon L.J. were right in holding that the appellants, whom they found to be infringers, were not entitled to claim mitigation of the consequences by reason of their not having been aware and having no reasonable ground for suspecting that copyright existed.

LORD ROCHE. My Lords, I also am of opinion that this appeal should be allowed. The division of opinion in the courts below shows that the question of fact is not an easy one, but the reasons for holding that no copyright existed in the works in question which have been assigned by the trial judge, by Luxmoore L.J. in the Court of Appeal, and by the Lord Chancellor and my noble friend Lord Macmillan meet with my full concurrence. I only desire to add that I do not rest my conclusion on any consideration of onus of proof. In my judgment, the facts as a whole disprove the respondents' claim to copyright. At the same time I wish to make it plain that on the facts and pleadings in this case I have no doubt that the onus rested on the respondents, the plaintiffs in the action. I agree with the view of Uthwatt J. and Luxmoore L.J. as to the effect of s. 6 of the Copyright Act, and I reject the argument advanced on behalf of the respondents as to the construction and meaning of that section.

Lord Porter. My Lords, this is a claim to establish copyright in an almanac consisting of seven tables and forming part of a diary. The respondents, who were plaintiffs in the action, relied on the selection of topics included in the diary and did not seek to prove copyright in any individual table, though they said they might have done so and were entitled to support their claim to originality in the whole by any originality which might be found in the parts. Two points were taken on behalf of the appellants, the defendants in the action. In the first place, they said that the almanac was not an original work within the meaning ascribed to that phrase in the Copyright Act of 1911. If, however, contrary to their contention, the court should hold that the seven tables were susceptible of copyright, they said that they were innocent infringers, and, therefore, under s. 8 of the Act subject only to an injunction and not liable for damages. The respondents, on their part, not only maintained that the almanac was susceptible of copyright, but said that, by reason of the provisions of s. 6, sub-s. 3, of the Act, copyright must be presumed to exist in their publication until the contrary was proved. This result, they asserted, followed from the wording of para. (*b*) of that sub-section, where it enacts that, if a name purporting to be that of the proprietor is printed on the work, the person whose name is so printed shall, unless the contrary is proved, be presumed to be the owner of the work. They also denied that the appellants were innocent infringers.

My Lords, having regard to the opinion which I have formed on the main question as to the susceptibility of the almanac to copyright, I refrain from expressing any opinion on the other two arguments. For the purpose of this opinion I am prepared to assume (1.) that the respondents are owners of a work which is presumed to be the subject of copyright until that presumption is rebutted and (2.) that the appellants are not innocent infringers. Are, then, these seven tables, selected and combined together as they have been, capable of copyright? Uthwatt J. thought not. The Court of Appeal, by a majority of two to one, thought that they were.

It is not denied that compilations are susceptible of copyright even though the matter compiled of itself contains nothing new. *Macmillan* v. *Suresh Chunder Deb* (1), which was approved in the Privy Council in *Macmillan & Co., Ld.* v. *K. & J. Cooper* (2), is sufficient authority for this proposition. Nor does it matter, if a substantial portion of the compilation be taken, that the copier added fresh matter of his own or took only a part of the original compilation. On the other hand, as was conceded, no copyright exists merely by reason of the order in which the various items are placed. It is their selection, not their position inter se, which is alleged to constitute copyright. Bearing these considerations in mind, the question to be answered is, have the appellants succeeded in showing that the almanac in question is not susceptible of copyright? I think they have. It is conceded that, if the work, labour and skill required to make the selection and to compile the tables which form its items is negligible, then no copyright can subsist in it. Whether enough work, labour and skill is involved, and what its value is, must always be a question of degree. Different minds will differ, as may be seen in the present case from the divergence of opinion in the courts below.

Speaking for myself, it appears to me that it is of the smallest. Like Uthwatt J. and Luxmoore L.J., I think that (3) "apart "from any evidence, the compilation for which copyright is "claimed is nothing more than a commonplace selection or "arrangement of scraps of information, neither of which has "involved any real exercise of labour, judgment or skill." And this is so whether one considers any individual table or the whole of them in combination. Even, therefore, if the respondents receive the benefit of a presumption that they are owners of copyright until that presumption is rebutted, it is, I think, rebutted by a consideration of the contents of the almanac itself and of the tables which are used as its items.

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(1) I. L. R. 17 C. 951.

(2) L. R. 51 Ind. App. 109; 93 L. J. (P. C.) 113.

(3) [1943] Ch. 133, 143.

The line may be a narrow one. *Leslie* v. *J. Young & Sons* (1), is one example of matters which have been held to fall on either side of it, though it is an illustration only of the principles involved and not an authority to guide a decision in other cases. Like MacKinnon L.J. (2), I find the present case "near the "line," but, speaking for myself, I would, contrary to his view, put it on that side on which copyright does not subsist. If a further example be of assistance, it is to be found in *Macmillan & Co., Ld.* v. *K. & J. Cooper* (3), where a selection of passages from Plutarch's life was held not to be susceptible of copyright, whereas certain notes appended to it were protected, though of a commonplace nature and at least in part themselves selected from older sources. Like Luxmoore L.J. (4), where he adopts Lord Atkinson's words from that case, I think it impossible for the respondents to establish that the amount of knowledge, labour, judgment or literary skill or taste applied to the compilation of the tables and lists at the beginning of the respondents' Liteblue Diary for 1933 entitles that compilation to copyright. I would allow the appeal.

LORD SIMONDS. My Lords, I concur.

Appeal allowed.

Solicitors for appellants: *Rubinstein, Nash & Co.*
Solicitors for respondents: *Henry Pumfrey & Sons.*

(1) [1894] A. C. 335.
(2) [1943] Ch. 133, 140.
(3) L. R. 51 Ind. App. 109; 93 L. J. (P. C.) 113.
(4) [1943] Ch. 133, 142.

[HOUSE OF LORDS.]

H. L. (E.)*
1944
April 26, 27;
May 1, 2;
June 21.

CHICHESTER DIOCESAN FUND AND BOARD OF FINANCE (INCORPORATED) } APPELLANTS;

AND

SIMPSON AND OTHERS . . . . . RESPONDENTS.

Charity—Charitable bequest—"Charitable or benevolent object or objects"—Uncertainty.

A testator, by his will, directed his executors to apply the residue of his estate "for such charitable institution or institutions or other

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*Present: VISCOUNT SIMON L.C., LORD MACMILLAN, LORD WRIGHT, LORD PORTER and LORD SIMONDS.

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" charitable or benevolent object or objects in England " as they should in their absolute discretion select :—

Held (per Viscount Simon L.C., Lord Macmillan, Lord Porter and Lord Simonds, Lord Wright dissenting), that the bequest was void for uncertainty.

Decision of the Court of Appeal (sub. nom. *In re Diplock* [1941] Ch. 253) affirmed.

APPEAL from the Court of Appeal.

The facts, stated by LORD SIMONDS, were as follows: Caleb Diplock, died on March 23, 1938, leaving no near relatives. By his will, which was dated November 3, 1919, the testator, after appointing executors and making certain bequests and devises, including a gift of " the following charitable legacies," which he set out, gave the residue of his estate to his executors on trust to sell or call in the same, and, subject to certain payments thereout, directed them to " apply the residue for " such charitable institution or institutions or other charitable " or benevolent object or objects in England as my acting " executors or executor may in their or his absolute discretion " select, and to be paid to or for such institutions and objects " if more than one in such proportions as my executors or " executor may think proper." The testator added certain administrative directions. The will was duly proved on May 16, 1938, and the executors forthwith proceeded to a distribution of the testator's large estate, amounting to over 250,000*l.*, among a hundred and thirty-nine charitable and benevolent objects and institutions, one of which was the appellants the Chichester Diocesan Fund and Board of Finance (Incorporated). After the estate had been distributed the validity of the residuary bequest and the propriety of the distribution were challenged by certain persons who had fortuitously discovered a possible flaw in the will and claimed to be some of the next-of-kin of the testator and accordingly to be entitled to a share of his residuary estate as on his intestacy. On June 10, 1940, the originating summons, out of which this appeal arose, was taken out by the executors in the Chancery Division for the determination of the single question whether the trust of residue contained in the will was a valid charitable trust or was void for uncertainty or otherwise. To this summons the appellants, who represented the charities among which the residuary estate had been distributed, the claimant next-of-kin and the Attorney-General were made defendants. The Court of Appeal (Lord Greene M.R., Clauson and Goddard L.JJ.), reversing Farwell J., held that the gift was void for uncertainty. The appellants appealed to the House of Lords.

Harman K.C. and *Humphrey King* (for *Wigglesworth* on war service) for the appellants. The gift of residue was not void. It is true that a man must make his own will and cannot delegate its dispositions to others and that can defeat the claims of his next-of-kin only by making an effective disposition of his property either in favour of an ascertained or ascertainable person or class of persons or in favour of charity, but, in the case of a gift to charity, he may give power to his executor to select the object of the gift. [*Houston* v. *Burns* (1) was cited.] A gift may be benevolent, but not charitable: *Income Tax Commissioners* v. *Pemsel* (2); and if the word "benevolent" alone had been used in the will, that term would be too vague and the gift would be void: *James* v. *Allen* (3). It would likewise be void if the words used gave the executors a choice of objects going beyond what the law recognizes as charitable. The testator must be presumed to have known the law on this point, and on the true construction of the will he did not intend to benefit any institution or object which was not charitable. The word "benevolent" coupled with the word "charitable" may be treated as taking its colour from the association, so that it is merely explanatory implying that the two words mean the same thing "or" being read as "id est." The word "other" refers back to the words "charitable institution "or institutions" preceding it, so that what is subsequently indicated must be of the genus charitable. Alternatively, the phrase "charitable or benevolent" may be read as limiting the scope of the gift to objects which are both charitable and benevolent. The word "or" is immaterial and was probably included by a clerical slip. The will as a whole shows a general charitable intention in the light of which the word "benevolent" must be read. There can be no authority on the meaning of "benevolent" since it is not a term of art. To find its meaning one must look at its context. This is a question, not of seeing whether the testator has used a particular word, but of putting the right construction on the words which he has used in the light of their context. The ordinary reader, looking at the words he has chosen, would come to the conclusion that he intended to give his residue to charity and that he meant by " charitable " the relief of poverty, sickness and old age, and by " benevolent " eleemosynary or for the relief of poverty. The testator used the word " charitable " in the popular sense, which is narrower than that of the statute 43 Eliz. c. 4. In the construction of a will the spirit of the document and the intention of the testator should be given greater weight than the mere letter, and authority should not be abused so as to defeat that intention: *Key* v. *Key* (1); *Grey* v. *Pearson* (2); *In re Morgan* (3); *In re Palmer* (4); *In re Redfern* (5). The decisions of the House of Lords and the Privy Council leave this point open: *Hunter* v. *Attorney-General* (6); *Attorney-General for New Zealand* v. *Brown* (7); *Bowman* v. *Secular Society, Ld.* (8); *Houston* v. *Burns* (9). In the lower courts *In re Bennett* (10) and *In re Ludlow* (11) are in favour of the contention of the appellants, which is also supported by the Scottish decisions: *Hay's Trustees* v. *Baillie* (12); *Paterson's Trustees* v. *Paterson* (13); *Mackinnon's Trustees* v. *Mackinnon* (14); *Reid's Trustees* v. *Cattanach's Trustees* (15). It would not be satisfactory if a verbal distinction which is not perceptible to any ordinary man should result in damage to so many charities.

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(1) [1918] A. C. 337, 342.
(2) [1891] A. C. 531, 564.
(3) (1817) 3 Mer. 17.

Sir Donald Somervell A.-G. and *Danckwerts* for the Crown. Prima facie the word " benevolent " has a wider meaning than " charitable " and, accordingly, if left at large in a disposition in a will, it causes that disposition to fail. There is, however, no binding authority precluding the House of Lords from adopting, in the construction of English wills, the principles applied in Scotland when the word occurs in testamentary dispositions there. On any view, the difference between " benevolent " and " charitable " is a fine one, and a very small indication that " benevolent " was intended to be confined within the charitable field should readily be taken as sufficient: see *Attorney-General for New Zealand* v. *Brown* (7); *In re Bennett* (10) and *In re Best* (16). In the main, " benevolence "

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(1) (1853) 4 De G. M. & G. 73, 84.
(2) (1857) 6 H. L. C. 61, 99.
(3) [1893] 3 Ch. 222, 226.
(4) [1893] 3 Ch. 369, 373.
(5) (1877) 6 Ch. D. 133, 136, 138.
(6) [1899] A. C. 309, 323.
(7) [1917] A. C. 393.
(8) [1917] A. C. 406, 441.
(9) [1918) A. C. 341.
(10) [1920] 1 Ch. 305, 309.
(11) (1923) 93 L. J. (Ch.) 30.
(12) 1908 S. C. 1224.
(13) 1909 S. C. 485, 486.
(14) 1909 S. C. 1041.
(15) 1929 S. C. 727, 744.
(16) [1904] 2 Ch. 354.

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in its ordinary sense connotes the same thing as "charity." Both words in their popular sense may include some things not within the legal conception of "charity." Even taking the legal conception, the overlap of "benevolent" beyond charitable is very small. Indeed, the purposes set out under the classification of charitable purposes in Tudor on Charities, 5th ed., p. 8, could equally well come under the description of "benevolence." The special language of this will justifies a reading of "benevolent," in the phrase used, as not enlarging the area of the bequest so as to include non-charitable objects. Alternatively, the decision in *In re Jarman's Estate* (1) that a gift to "charitable or benevolent" purposes fails was wrong and should be overruled. The Scots principle should be applied and, irrespective of the earlier words, the word "benevolent" should be treated as not enlarging the scope of the disposition. The whole area of "charity" as understood in Scots law falls within the area of "charity" in English law. Since in Scotland the area is smaller, there would be a real inconsistency in holding that a gift to "charitable or benevolent" purposes is good in Scotland but bad in England.

Romer K.C. and *Fawell* for the respondent next-of-kin. The conclusion of the Court of Appeal is inescapable. There is a danger of getting this case into the wrong perspective owing to the circumstances that a large sum is involved, that the next-of-kin are only distantly related to the testator, and that the executors have already parted with the property. All these matters are irrelevant, and the decision must be the same as if the testator had left a small estate and near relations and the executors had come to the court with a construction summons immediately after his death. The basic principles of the law involved are not in doubt: *In re Macduff* (2). A plain gift for "charitable or other purposes" is bad. The same result follows if the word "benevolent" replaces "other," for "benevolent" has a scope far beyond charitable in the legal sense. A gift in a will must be definite. "Charity," in its legal sense, has a technical meaning, and in that sense it can be defined so as to be enforceable. Its technical sense provides a boundary and links up with the principle that a testator cannot leave it to someone else to make his will for him: *James* v. *Allen* (3); *Williams* v. *Kershaw* (4); *In re Jarman's*

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(1) (1878) 8 Ch. D. 584.

(2) [1896] 2 Ch. 451, 457, 462, 469.

(3) 3 Mer. 17.

(4) (1835) 5 Cl. & F. 111 n.

Estate, Leavers v. *Clayton* (1); *Income Tax Commissioners* v. *Pemsel* (2); *Hunter* v. *Attorney-General* (3); *Attorney-General for New Zealand* v. *Brown* (4); *Bowman* v. *Secular Society, Ld.* (5); *Caldwell* v. *Caldwell* (6); *Attorney-General* v. *National Provincial and Union Bank of England* (7); *Attorney-General for New Zealand* v. *New Zealand Insurance Co., Ld.* (8); *In re Horrocks, Taylor* v. *Kershaw* (9). In the face of this authority the House should be slow to accept the Attorney-General's invitation to overrule *In re Jarman's Estate* (10). Accordingly, the phrase " charitable or benevolent " invalidates the gift since the two words have not the same meaning. " Benevolent " falls short of " charitable " in some respects and goes beyond it in others: see the definition of " benevolence " in the Oxford English Dictionary. The whole field of private charity is outside the legal meaning of " charity," but within that of " benevolence ": see Halsbury's Laws of England, 2nd ed., vol. 4, pp. 128-9. " Parish work " is not within the legal meaning of charity: *Farley* v. *Westminster Bank* (11), but it would be within the conception of benevolence. As regards the Scots cases, in *Hay's Trustees* v. *Baillie* (12) the gift was to institutions and no one could suggest a benevolent institution which was not also charitable. *Paterson's Trustees* v. *Paterson* (13) went no further than that case. *Mackinnon's Trustees* v. *Mackinnon* (14) marks the distinction between English and Scots law. The Court of Session refused to follow *In re Macduff* (15), but that case is authoritative in England. *Reid's Trustees* v. *Cattanach's Trustees* (16) was decided on another point. The construction of this will must be approached on the footing that, whereas the word " charitable " is sufficiently clear to support a good gift, " benevolent " is not, and that the words are materially distinct, read as they must be in their ordinary, proper and grammatical meaning: see Hawkins on Wills, 3rd ed., p. 3, proposition II, and *Abbott* v. *Middleton* (17). There is here no context which requires a different interpretation as a matter of necessity. In construing

(1) 8 Ch. D. 584, 587.
(2) [1891] A. C. 531, 580.
(3) [1899] A. C. 309, 315.
(4) [1917] A. C. 393.
(5) [1917] A. C. 406, 441.
(6) (1921) 91 L. J. (P. C.) 95.
(7) [1924] A. C. 262.
(8) (1936) 53 T. L. R. 37.
(9) [1939] P. 198, 209.
(10) 8 Ch. D. 584.
(11) [1939] A. C. 430, 433.
(12) 1908 S. C. 1224.
(13) 1909 S. C. 485.
(14) 1909 S. C. 1041.
(15) [1896] 2 Ch. 451.
(16) 1929 S. C. 727.
(17) (1858) 7 H. L. C. 68, 93, 115.

the will some effect should be given, if possible, to every word and expression used. The testator intended to indicate three classes: (1.) charitable institutions, (2.) charitable objects other than institutions and (3.) benevolent objects. The word "other" was intended to link up "institutions" with "objects" which has a wider scope. The word "or" appears between two adjectives which ex hypothesi have different meanings. It is a disjunctive, there being no strong and plain context to indicate that it was meant as a copulative. If it were read as "id est," it would be destructive of the whole gift. The wording indicates a true alternative. On the wording of this will, if the trustees decided to give part of the estate to a deserving object outside the range of "charity" as understood by the law, they would not be committing a breach of trust.

Harman K.C. in reply. The phrase "any benevolent or "charitable purpose" occurs in the Friendly Societies Act, 1896, and, accordingly, cannot be too uncertain to be given a definite meaning. This is a case to which the doctrine of the overriding charitable intention applies: see *Hunter* v. *Attorney-General* (1). The principles applicable are not in doubt. In their printed case the appellants have expressly submitted that without departing from the legal principles enumerated by Lord Greene M.R., the decision of the Court of Appeal on the question of construction must be held to be erroneous. The appellants rely on the following points: (1.) A testator must dispose of his property by his will himself and must not delegate the disposition to others. (2.) He can, however, leave to others the selection of the object of a charitable gift. The words of the will must be construed in their natural import, but it is quite proper to use the word "or" exegetically as in "common or garden." (3.) It is the duty of the court to seek by all legitimate means to give effect to the testator's intention as expressed in his will. The court must assume that he did not intend to die intestate. (4.) "A benignant construc-"tion will be placed upon charitable bequests": *Weir* v. *Crum-Brown* (2) per Lord Loreburn L.C. (5.) If two interpretations of the language of the testator are reasonably possible, one of which will make the will effectual while the other will defeat it, the court will adopt the former and reject the latter. There is no canon of construction involved which obliges the court to decide one way or another on this point of construction and it is wrong to thrust these words into the

(1) [1899] A. C. 309, 324.

(12) [1908] A. C. 162, 167.

bed of Procrustes, since modes of expression by testators are infinitely various. Apart from authority the will presents no difficulty to the candid reader. In similar cases the Scots lawyers have found no difficulty in reading the word " or " in its exegetical sense. The use of the same words should not produce different results in England and in Scotland. The fact that the testator had no near relatives fortifies the conclusion that charity was his governing intention, and there is enough in the will to indicate this.

The House took time for consideration.

June 21. VISCOUNT SIMON L.C. My Lords, the will with which we are concerned in this appeal is one in which a public-spirited testator has directed his executors to apply the very substantial residue of his property " for such charitable institu-" tion or institutions or other charitable or benevolent object or " objects in England " as they should select. The Court of Appeal (Lord Greene M.R., Clauson and Goddard L.JJ.), overruling Farwell J., has decided that this is not a valid testamentary disposition. After studying the powerful judgment of the Master of the Rolls and weighing the arguments which have been presented to the House, I cannot doubt that a gift expressed in the terms which I have quoted, in the absence of context to vary its prima facie meaning, is void for uncertainty.

The fundamental principle is that the testator must by the terms of his will himself dispose of the property with which the will proposes to deal. With one single exception, he cannot by his will direct executors or trustees to do the business for him. That exception arises when the testator is minded to make gifts for charitable purposes, and where he directs his executors or trustees, within such limitations as he chooses to lay down, to make the selection of charities to be benefited. This exception from the general principle that the testator has to decide in his will the specific destination of his property is allowed because of the special favour which the English law shows to charities, and the conception of what is charitable for such purposes has been elaborately worked out so that the courts are able to determine whether a particular gift is charitable or not, but when, as here, the expression is " charitable or benevolent," it is impossible to attribute to the word " benevolent " an equal precision or to regard the courts as able to decide with accuracy the ambit of that expression. It is not disputed that the two words " charitable " and " benevolent " do not ordinarily mean

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the same thing. They overlap in the sense that each of them, as a matter of legal interpretation, covers some common ground, but also something which is not covered by the other. It appears to me that it inevitably follows that the phrase "charitable or benevolent" occurring in a will must, in its ordinary context, be regarded as too vague to give the certainty necessary before such a provision can be supported or enforced.

Is there, then, any special context in this will which would justify a different interpretation? I have listened with much sympathy to the efforts to find one, but it does not seem to me, notwithstanding the late Farwell J.'s opinion, that there is any context which might give to the impeached phrase a special meaning. The conjunction "or" may be sometimes used to join two words the meaning of which is the same, but, as the conjunction appears in this will, it seems to me to indicate a variation rather than an identity between the coupled conceptions. Its use is analogous in the present instance to its use in a phrase like "the House of Lords or the House of Commons," rather than to its use in a phrase like "the House of Lords or "the Upper Chamber." I regret that we have to arrive at such a conclusion, but we have no right to set at nought an established principle such as this in the construction of wills, and I, therefore, move the House to dismiss the appeal.

LORD MACMILLAN. My Lords, the law, in according the right to dispose of property mortis causa by will, is exacting in its requirement that the testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides. The choice of beneficiaries must be the testator's own choice. He cannot leave the disposal of his estate to others. The only latitude permitted is that, if he designates with sufficient precision a class of persons or objects to be benefited, he may delegate to his trustees the selection of individual persons or objects within the defined class. The class must not be described in terms so vague and indeterminate that the trustees are afforded no effective guidance as to the ambit of their power of selection: see *Houston* v. *Burns* (1), per Viscount Haldane. Unfortunately for the efficacy of their testamentary dispositions, testators or their advisers, as the many reported cases show, frequently fail to observe this rule and by the language which they employ leave their trustees at

(1) [1918] A. C. 337, 342, 343.

large in the selection of the persons or objects to be benefited with the result that the bequest is held void for uncertainty. Thus, a bequest to such public purposes as the testator's trustees may select is not " within the description of a particular " class of individuals or objects " : per Lord Davey in *Blair* v. *Duncan* (1). Nor is a bequest in favour of benevolent purposes to be selected by the testator's trustees sufficiently specific : see, e.g. *Attorney-General for New Zealand* v. *Brown* (2), and *Attorney-General for New Zealand* v. *New Zealand Insurance Co., Ld.* (3).

One class of objects, however, notwithstanding its generality and comprehensiveness, namely, charitable purposes, has always been accepted as sufficiently definite to satisfy the rule, because of the favour which the law extends to charity. Most of the cases which have arisen have been due to a tendency on the part of testators to associate with the word " charitable " other words of vague import. The present is one of these. Here the bequest is in favour of " such charitable institution or " institutions or other charitable or benevolent object or " objects in England as my acting executors or executor may " in their or his absolute discretion select." As the law of England stands, it is impossible to sustain this bequest as valid. The testator has empowered his executors to distribute the residue of his estate inter alia among either charitable objects or benevolent objects and has thereby empowered them to devote the whole bequest, if they please, to benevolent objects, a class of objects which has over and over again been held by the courts to be too uncertain. Alike on authority and on principle the bequest is, accordingly, void.

In construing a will it is proper to read the instrument as a whole. By doing so it may sometimes be found that a testator has used a word or a phrase in a sense of his own, different from its ordinary connotation. If a testator were to make a bequest in favour of benevolent objects, adding " by which I mean " charitable objects," the bequest might well be held to be valid. In the present instance, however, I cannot find any context either in the words of the bequest itself or elsewhere in the will which would justify imparting to the testator's use of the word " benevolent " any other than its ordinary wide signification. If the testator had written " charitable and " benevolent " instead of " charitable or benevolent " the

(1) [1902] A. C. 37, 44.
(2) [1917] A. C. 393.
(3) 53 T. L. R. 37.

bequest would, on the authorities, have been sustained, for it would then have been read as in favour of such benevolent objects as are charitable or such charitable objects as are benevolent, charity in either way predominating, but again I find no warrant for reading conjunctively two words which the testator has expressly disjoined.

I confess it is somewhat disconcerting to find that the Court of Session in Scotland has in a number of instances taken a different view in construing words very similar to those now under consideration by this House. Thus, it has been held competent for a testator in Scotland to empower his trustees to make a selection among "societies or institutions of a "benevolent or charitable nature": *Hay's Trustees* v. *Baillie* (1); or among "charities or benevolent or beneficent "institutions": *Paterson's Trustees* v. *Paterson* (2); or among "charitable or philanthropic institutions": *Mackinnon's Trustees* v. *Mackinnon* (3). The topic is very fully discussed in *Reid's Trustees* v. *Cattanach's Trustees* (4), where the introduction of "public institutions" as an alternative was held fatal to the bequest. Yet in Scots law the principle that a testator must himself designate his beneficiaries and cannot delegate to others the selection of beneficiaries from an indefinite class is equally well established, and so, too, is the recognition of charitable objects as a sufficiently definite class. It would be out of place to discuss here the validity of the processes of reasoning by which the courts in Scotland reached the decisions which I have just cited. I may remark that they seem to have turned mainly on an interpretation of the monosyllable "or," interposed between the word "charitable" and the other words in question, not as separating distinct and contrasted classes of objects, but rather as an exegetical link between convertible and equivalent synonyms. The fact that in Scotland the term "charitable" has in law a less rigidly technical and artificial meaning than in England may also have had something to do with it. But I must not allow myself to be enticed into a further exploration of what for the present purpose is a foreign field, however attractive. This is an English case, and in my opinion the decision of the Court of Appeal is in conformity with the law of England and should be affirmed.

LORD WRIGHT. My Lords, the testator in this case after various bequests, left the residue of his estate to his executors to apply to "such charitable institution or institutions or other "charitable or benevolent object or objects in England" as in their absolute discretion they should select. He died in 1936. The will having in due course been proved, the executors distributed the residue, amounting to over a quarter of a million sterling, among some one hundred and forty institutions or objects which could properly be described as both charitable and benevolent, but some time afterwards certain next-of-kin claimed that the bequest of the residue was invalid and that the next-of-kin were entitled to have it. The question, of course, has to be determined on the language of the will. There was no suggestion that the testator did not mean to leave the residue to charities. The objection was that the bequest was invalid because the words "or benevolent" introduced a different category from "charitable" which preceded them. It was not questioned that, if the words had been "charitable and "benevolent," the bequest would have been perfectly good. That would mean objects which were both charitable and benevolent. The word "or," it was said, severed "charitable" from "benevolent," so that two different classes were meant, and the executors were thus faced with a choice between two different categories and could have distributed the residue among objects which were benevolent but not charitable, and that it was beyond the powers of the court, when engaged in administering trusts, to apportion the distribution between what was charitable and what was benevolent. The bequest, it was said, was void for uncertainty. By using "or" instead of "and" the testator had fallen into what was called a trap. The whole bequest was thus void.

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(1) 1908 S. C. 1224.
(2) 1909 S. C. 485.
(3) 1909 S. C. 1041.
(4) 1929 S. C. 727.

No one would deny that charitable bequests, which may be made by general words for objects to be selected by the executors and which are free from certain restrictions such as the rule against perpetuities and have certain immunities under the Income Tax Acts, should be scrutinized before their right to be classed as charitable is admitted, but it is a different matter to make the test depend on anything but matters of substance. Courts of equity have been criticized for their construction of particular words of bequest or their limitation of what bequests are permissible as charitable. In *Bourne* v. *Keane* (1) the House of Lords overruled a series of authorities extending from 1835 and upheld the validity of a bequest of personal estate for masses for the dead. There was no decision binding the House

(1) [1919] A. C. 815.

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so as to prevent them holding as they did. In the present case the question relates to the construction of the words of the particular will. These have to be construed as they occur in their context. The decision depends, in my opinion, on the meaning of the few relevant words. The question is whether the words " or other charitable or benevolent object or objects " mean in their setting two separate classes, the one class charitable and the other benevolent, regarded as distinct or separate, or whether they mean one class only, that is, of objects which may be indifferently described as charitable or benevolent. There is no difficulty in the latter construction. There is no authority binding this House to exclude it in this particular case. The two words run so closely into each other in meaning and overlap so largely that it is a natural view. In addition, the preceding sentence seems to me to confirm this construction simply as a matter of words. The difficulty arises from the want of definition which has always characterized this branch of law. If, in the case of a general bequest to charity, so much depends on the mere word which is to govern the executor's power of selection, the least that could be expected would be a precise definition of the meaning and scope of the dominant word, which is " charity." The difficulty in a case like the present is not quite the same as the difficulty which has constantly faced the court in deciding whether a specific purpose named in a bequest is or is not charitable. That, indeed, has led to a host of decisions, often difficult to reconcile or explain. Lord Sterndale M.R. dealt with both aspects of the difficulty in *In re Tetley* (1). The question there was the meaning of the word " patriotic." He lamented the absence of " any principle which will guide one easily, and safely, through " the tangle of cases as to what is and what is not a charitable " gift. . . . . The whole subject is in an artificial atmosphere " altogether." Dr. Allen, the learned author of Law in the Making, 3rd ed., p. 343, has dwelt on the same difficulty. I confess I am convinced that the time has come when modern minds imbued with modern ideas should attempt to achieve a clear, workable, and comprehensive definition of what is meant by charitable and its cognate terms, such as benevolent, philanthropic, and the like. That is a task for the legislature.

These reflections, however, will not help in deciding what is the true construction of this will, but I find to my regret that I cannot approach this question or examine authorities which seem to me to throw any light on its decision until I have attempted to understand from the reports what " charitable " and other kindred words have been taken to mean. I do not think that I have found any accepted or satisfactory definitions. I may start with the Statute of 43 Eliz., c. 4 (1601). That statute, or more correctly its preamble, together with analogies drawn from it, is still even now, it seems, taken as authoritative. The preamble will be found conveniently set out in s. 13, sub-s. 2, of the Mortmain and Charitable Uses Act, 1888, which, after reciting that " in divers enactments and documents reference is made to charities within the meaning, " purview, and interpretation of the said Act," enacted " that " references to such charities shall be construed as references to " charities within the meaning, purview, and interpretation of " the said preamble." In other respects the Act of 1888 repealed the Act of Elizabeth : s. 13, sub-s. 1. That Act had provided a special proceeding under the Chancellor for the reform of deceits and breaches of trust, touching land given to charitable uses. It had long become obsolete when it was repealed in 1888, subject to the limited saving of the preamble quoted above. That, however, did not contain any definition of the charities it referred to. What it contained was " a list of " charities so varied and comprehensive that it became the " practice of the court [of Chancery] to refer to it as a sort of " index or chart." This was observed by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (1). Charities had even before 1601 been subject to the equitable jurisdiction of the Court of Chancery, but the Act of 1601 did not give a definition of " charities," but merely a collection of instances of a somewhat miscellaneous character. The collection included, in addition to objects which would ordinarily be considered to be eleemosynary objects, other objects, such as schools of learning, repair of bridges, ports, havens and churches and other objects of general utility. It is difficult to find definitions of charity, though, as Lord Macnaghten explained (1), it has a legal technical sense in English law, but in 1767 Lord Camden L.C., in *Jones* v. *Williams* (2), defined it as " a gift to a general public " use, which extends to the poor as well as to the rich." In *Goodman* v. *Saltash Corporation* (3), Lord Selborne L.C. said that " a gift subject to a condition or trust for the benefit of the " inhabitants of a parish or town, or of any particular class

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(1) [1923] 1 Ch. 258, 266.

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(1) [1891] A. C. 531, 581.

(2) (1767) Amb. 651, 652.

(3) (1882) 7 App. Cas. 633, 642.

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" of such inhabitants, is (as I understand the law) a charitable " trust," and he cited *Wright* v. *Hobert* (1) in which the Earl of Macclesfield L.C. established as a charitable trust an ancient grant of land for the pasture during three months of the year of the cows of as many of the inhabitants of a certain village as were able to buy three cows. These inhabitants might, perhaps, have been counted on the fingers of one hand.

Not only by the original list in the Act of Elizabeth, but by the mass of decisions which have been given by the free use of analogies extending the original items between that date and the present, it is made clear that " charitable trust " in England is a very comprehensive term, including " purposes beneficial " to the community," which Lord Macnaghten stated as the fourth and most general of the four principal divisions in his definition of charity in its legal sense. This division was to cover purposes not falling under any of his other three divisions, which are " trusts for the relief of poverty; trusts for the " advancement of education; trusts for the advancement of " religion." That was in *Pemsel's* case (2). The question in the case was whether the word charity, as used in the Income Tax Acts, bore the same meaning in its application to Scotland as it did when applied in England and Ireland. The House of Lords held that it did, even though the technical meaning of the word, that is its comprehensive meaning, which includes education or religious or other general charities as well as charities for the relief of the poor, did not completely prevail in Scotland, but Lord Macnaghten concluded that he could not discover any great dissimilarity between the law of Scotland and the law of England with respect to charities. His definition has been subjected to certain criticisms, particularly the fourth division, but shows the extraordinarily wide and indeterminate range covered by the word " charity " in England whenever it is to be construed in its technical legal sense. Lindley L.J., after referring to the very wide and indefinite sense in which the word " charitable " is used in courts of equity, adds: " Probably not one man in a thousand understands what that " sense is; and the sense itself is a very indefinite one ": *In re Macduff* (3). This breadth is confirmed by the decisions on charities. I shall be content to refer merely to two lists of instances. The first is that contained in Tothill's Transactions in the High Court of Chancery, List 27, which contains decisions

(1) (1723) 9 Mod. 64.
(2) [1891] A. C. 531, 583.
(3) [1896] 2 Ch. 451, 464.

on charitable uses between 1598 and 1639. The second is the very full collection of decisions up to 1932 as to what are or are not charities in Halsbury's Laws of England, 2nd ed., vol. 4, pp. 107 to 138.

The wide range and variety are bewildering, and show how generously the court has availed itself of the licence to extend the Act of Elizabeth by analogy, but, all the same, it is impossible not to feel sometimes how difficult particular decisions are to reconcile with others, or to understand why one charity is taken and another left, or not to feel that over-subtle or fine distinctions have been drawn. The absence of a modern and scientific definition cannot fail to introduce uncertainty, as the great mass of contested litigation shows, but what I am concerned with at the moment is that though charity is a very wide and comprehensive term, as shown in its particular applications, distinctions have at times been drawn between "charitable" as a general term, and other similar general terms, as occasionally used where there is a disposition in favour of general objects. The Court of Chancery, however, have adopted "charity" or "charitable" as a sufficient general description in cases where testators have left bequests to such charitable objects as their executors may select. This has been held to be a sufficient definition to enable the court to administer the trust, but, if a second description is added and that second description is used disjunctively, not conjunctively, the court washes its hands of the administration and holds the entire bequest invalid. The whole gift fails for uncertainty. There is, it is said, no general trust for charity binding the whole fund. The court will not disregard the invalid part of the bequest and administer the valid. Such is the rule of the court. Whether it is a wise or sensible rule it is not here material to consider. By way of contrast, though the cases are not quite parallel, it may be noted that the common law ever since *Pigot's* case (1), has held that when in the same instrument there are both legal and illegal conditions the legal conditions may prima facie be enforced whereas the part which is illegal cannot. Courts of equity have been more rigid and have refused to apply anything like their cy-près doctrine to such cases or to make any apportionment. They have most nearly approached an apportionment in cases like *In re Douglas* (2), but that is regarded as a special and different type. Lord Davey discusses these distinctions in *Hunter* v. *Attorney-General* (3), but the

(1) (1614) 11 Co. Rep. 26b.

(2) (1887) 35 Ch. D. 472.

(3) [1899] A. C. 309, 324.

strict rule only applies if it is sought to give the executors a real choice between two separate objects only one of which is charitable, that is, if the two substantives or adjectives are to be read disjunctively. If they are to be read conjunctively, then there is only one class or area of selection, and, if that is charitable, the bequest is good. Such a case is illustrated by *In re Best* (1), where the two adjectives charitable and benevolent, coupled, it is true, by " and " (but " and " and " or " may be interchangeable), were held to describe a single class, the members of which combine the qualities of charitable and benevolent. This is possible because of the wide and vague range of the word " charitable " and its close kinship with " benevolent." Whether the words are used in any particular will as conjunctive or disjunctive must be a question of construction of the particular will. " Benevolent," which is the other material term here, is also a word of wide connotation, and almost interchangeable with " charitable."

That the two words overlap to a very great extent is clear. Lord Herschell, in *Pemsel's* case (2), is careful to equate " charity " and " benevolence " even as the words are popularly used. He sums up, that " the popular conception of a charit-" able purpose covers the relief of any form of necessity, " destitution, or helplessness which excites the compassion " or sympathy of men, and so appeals to their benevolence for " relief." He goes on to include in this conception of charity " the relief of what is often termed spiritual " destitution or need," and treats that as a form of " benevolent " assistance." In these senses it seems to me that the word " benevolence " is used of the spiritual impulse, while charity is its embodiment in practice. Lord Herschell would, I think, have used the same language in reference to the purposes, religious or educational or other purposes beneficial to the community, to which Lord Macnaghten referred. The provision of good water or any scheme of social amelioration involves benevolent motives and their practical operation. It may, indeed, be that the benevolent motive is less apparent or in a sense is non-existent in such instances as the repair of sea banks or the furtherance of scientific research, which would fall outside the popular idea of charity. It might thus be said that some charitable purposes, in the sense adopted by English law, are not benevolent, and, conversely, that some benevolent acts are not charitable. Lord Bramwell, dissenting in *Pemsel's*

(1) [1904] 2 Ch. 354.

(2) [1891] A. C. 531, 572.

case (1), gave as instances of purposes which he regarded as benevolent but not charitable in the legal sense a fund for providing oysters at one of the Inns of Court or a trust to provide music on the village green. As to the latter, modern ideas would be disposed to treat the gift as both benevolent and charitable, as it would a fund for the provision of music in a London park. The fund for the oysters I should not be disposed to regard as either benevolent or charitable in any ordinary or technical sense. The leading case, *Morice* v. *Bishop of Durham* (2), is relied on as showing that the word "benevolent," used by itself, or coupled, as it was in that case, with "liberal," is insufficient to evince a charitable purpose. Lord Eldon L.C., put the question "whether, according to the "ordinary sense . . . . this testatrix meant by these words to "confine the defendant to such acts of charity or charitable "purposes as this court would have enforced by decree, and "reference to a master." He decided in the negative and held that the intention was too indefinite to create a trust. There the words were not bound up with words or a context showing a charitable intention, but, on the contrary, showed the opposite. Lord Eldon said (3) that on such words the court could not have charged the executor "with maladministration, if he had "applied the whole to purposes, which, according to the "meaning of the testator, are benevolent and liberal: though "not acts of that species of benevolence and liberality, which "this court in the construction of a will calls charitable acts." Lord Eldon said (3) that "there is no magic in words; and if the "real meaning of these words is charity or charitable purposes, "according to the technical sense, in which those words are "used in this court, all the consequences follow." This qualification should be noted.

It may be that the word "liberal" gave a special colour to the word "benevolent" and took its scope outside charitable purposes. It might, for instance, have covered the case of the fund for providing oysters or other lavish entertainment, but in *James* v. *Allen* (4), the bequest was simply for "benevolent "purposes," at the discretion of the trustees. Grant M.R. was of opinion that the property might have been "applied to "other than strictly charitable purposes" and the trust was "too indefinite for the court to execute" and failed altogether. This was the decision where the word "benevolent" stood by itself without any context showing or excluding a charitable intent, but later cases have shown that the word " benevolent " is not fatal to a finding of a charitable trust. It becomes a question of the construction of the particular will, whether its language sufficiently evinces a charitable trust. As Lord Cottenham L.C. said in *Ellis* v. *Selby* (1): " the present, " like other cases of construction, depends upon the particular " language which the testator has used, and very slight " expressions may make a most material difference." He held in that case that the expressions " to and for such charitable or " other purposes " were too wide and held the bequest void. He said he was following an earlier decision of his own, when Master of the Rolls, in *Williams* v. *Kershaw* (2), where the residue was to be applied " to and for such benevolent, " charitable and religious purposes " as the executors should think most advantageous and beneficial. He read the three purposes as not conjointly used, but as describing three classes, benevolent, or charitable, or religious. The two latter purposes would also be " charitable " in the legal sense, but that was not the case with " benevolent." He held the disposition too uncertain to receive effect. It is to be noted there that he read " and " as " or," and as having the same effect as " or " in the previous case. In each of these cases separate categories were held to be intended. Thus, according to the decisions, " and " and " or " were held to be interchangeable. That depended on the context and the lay-out of the sentences.

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(1) [1891] A. C. 564.

(2) (1805) 10 Ves. 521, 542.

(3) Ibid. 541.

(4) 3 Mer. 17, 19.

In *Dolan* v. *Macdermot* (3), Lord Cairns L.C. held valid a bequest of personalty for " such charities and other public " purposes as lawfully might be " in a named parish. The Lord Chancellor said that " the reasonable and fair construction " to be put upon this will—remembering always that in " construing a will of this kind the court must not lean to the " side of avoiding the will in order to gain money for the family, " nor, on the other hand, strain to support the will to gain " money for the charity—is that the testator directed his " residue to be laid out for the benefit of the parish of Tadmartin " ' in public charities,' using that term in the popular sense, " and in ' other public purposes ' ejusdem generis, using those " latter words as supplying and filling up a description of the " purposes which, although within the statute of Elizabeth and " the technical doctrine of the court with regard to charities,

(1) (1836) 1 Myl. & Cr. 286, 297, 298.

(2) 5 Cl. & F. 111 n.

(3) (1868) L. R. 3 Ch. 676, 678.

"are not within the popular meaning of the word 'charities'." I regard this decision as an object-lesson in realistic construction. The local limitation does not, of course, affect the essential question: *Houston* v. *Burns* (1). That last-named case was an appeal from Scotland where it was held that a bequest "for such public, benevolent, or charitable purposes" was invalid on the ground that the three categories were to be read disjunctively. This decision was largely determined by considering the punctuation. It had been contended that the clause should not be read as applying to public or benevolent or charitable purposes, but that on its true reading it was for the benefit of benevolent or charitable purposes of a public nature in connexion with the parish, and that, so construed, it was good as benevolent or charitable purposes could be held to be charitable purposes. As to that contention, Lord Finlay L.C. said (2): "It appears to me that without the punctuation "which appears in the will as printed in the appendix this is "quite a possible construction, and where words are ambiguous "a construction should be adopted which will not make the "bequest void." Lord Finlay then went on to discuss the punctuation, and on that ground held that the clause was to be read disjunctively. Though the appeal was from Scotland, the Lord Chancellor states a general principle which seems often to be lost sight of, namely, the principle that the issue depends on the construction of the particular will. In addition, the word "public" introduced a category different in character from either charitable or benevolent—*Blair* v. *Duncan* (3)—which makes it much more difficult in any case to read the words as dealing with anything but separate categories. In the same way this House in *Attorney-General* v. *National Provincial and Union Bank of England* (4), held that the words "patriotic" purposes and "charitable" institutions and objects must be read disjunctively. They describe disparate and separate classes. On the other hand, in *In re White* (5), the testator left his residue "to the following religious societies, viz."—there followed a blank. The word "charity" was not mentioned. The Court of Appeal, while recognizing the possibility that a religious society was not necessarily charitable, came to the conclusion that they could not, "without splitting straws," distinguish earlier cases which had held that a religious purpose

(1) [1918] A. C. 337.
(2) [1918] A. C. 341.
(3) [1902] A. C. 37.
(4) [1924] A. C. 262.
(5) [1893] 2 Ch. 41.

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was a charitable purpose, and that they ought to hold that the gift was for charitable purposes and not void for uncertainty. They approved *Wilkinson* v. *Lindgren* (1), which may be referred to for the use which Lord Hatherley L.C. made of the ejusdem generis rule. The bequest was for the benefit of certain named institutions, which the court held were in fact religious, or "to any other religious institutions" as the executors might think proper. The Lord Chancellor said that he did not see "how you can carry on the word 'other' without "carrying on 'religious' also." The gift was held not void.

I have referred to these cases as showing that the construction of a will cannot be reduced to the mere application of a fixed general formula. I think this is also illustrated by *Attorney-General for New Zealand* v. *Brown* (2), a decision of the Privy Council, which showed that "and" could and should there be read as "or." The bequest was in trust for such charitable, benevolent, religious and educational institutions "as the trustees should select." It was contended that the word "charitable" governed or at least explained the following words, so that "benevolent" objects must be read as though the words meant such benevolent objects as were in their nature the proper subject of a charitable gift. Lord Buckmaster rejected this contention, but he did not do so without examining other parts of the will, particularly the investment clause, in order to ascertain the testator's intention. The importance of the decision, which does not bind this House, is that though the decision in *In re Jarman's Estate* (3), to which I refer later, was cited, the question was not solved by a single absolute formula, such as Lord Parker (who was a member of the Board in *Attorney-General for New Zealand* v. *Brown* (2)), enunciated shortly afterwards in the form of the proposition that a gift for charitable or benevolent purposes is void for uncertainty: *Bowman* v. *Secular Society, Ld.* (4). This would, no doubt, be so provided that, on the true construction of the gift, the purposes were to be read disjunctively. That must depend on the language of the gift, but the point had not been argued and was not necessary for the decision of that case. Such general observations have no coercive value as precedents.

In re Jarman's Estate (3) may or may not have been right in the language of the particular gift. Hall V.-C. there held that a bequest to any charitable or benevolent purpose which the executors should agree on was indefinite and inoperative, so that the gift failed, but the case cannot, in my opinion, be construed as stating a general proposition of law that a gift for charitable or benevolent objects must be alternative or refer to two classes of objects. If it did, it cannot, in my opinion, be justified. Since that decision, *In re Sutton, Stone* v. *Attorney-General* (1), and *In re Best* (2), have been decided. Their effect was that a gift for such charitable and benevolent institutions as the trustees should determine is not void for uncertainty, but is a good charitable gift. It was held that the testator meant that the objects of the gift should be both charitable and benevolent. That is a natural construction, because not only are the two words, being both vague, practically indistinguishable, though, perhaps, in theory capable of some distinction, but, as Farwell J. said in *In re Best* (3), the testator may have wished that the two qualities should coincide in all the objects of the gift. Hence only one class was intended, combining both attributes. I think the same conclusion can be reached where the two adjectives are coupled by " or " instead of " and." These two particles are often to be read interchangeably, as I have shown. The testator in the present case is not likely to have thought of charitable and benevolent as describing two different classes of objects. He would prima facie mean a class of objects which could be indifferently described as charitable or benevolent, that is, one class having the same two-fold characteristics, if, indeed, he thought of them as more than two epithets having the same meaning. Such tautology is not uncommon. Perhaps, also, he may have desired that his money should not be devoted to building bridges or the like. This construction, which seems prima facie not only probable but also sensible, is, I think, confirmed by the frame of the sentence. The word " other " (" other charitable or benevolent object or objects in England ") seems to me to carry over the word " charitable " from the previous sentence. If the words had been " or other benevolent objects," I do not think that anyone would seriously contest that what was meant was " other charitable objects " capable also of being characterized as benevolent." The repetition of " charitable " strengthens that construction. So does the context. If " charitable " and " benevolent " had been completely different descriptions, instead of two descriptions, both vague and indeterminate, overlapping, and

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(1) (1870) L. R. 5 Ch. 570, 571.

(2) [1917] A. C. 393.

(3) 8 Ch. D. 584.

(4) [1917] A. C. 406, 441.

(1) (1885) 28 Ch. D. 464.
(2) [1904] 2 Ch. 354.
(3) Ibid. 356.

capable of being applied to the same objects, the result might be different. Thus a gift of pigs or cows would clearly present an alternative. The two descriptions could not be applied indifferently to the same animals, but a disposition in favour of dishonest or unprincipled men would not present a true alternative, though it might on other grounds be void for uncertainty. Only the adjectival description is alternative, and both adjectives are to be applied indifferently to the same objects. There is then only one class and not two. If the testator had expressly stated that only one class was meant, that statement would have received effect, but the same result may be reached by considering the context. This way of looking at the question has been adopted by the eminent Scottish judges, Lords Dunedin, Kinnear, Maclaren and Dundas, who have held that certain dispositions in favour of charitable or benevolent objects or the like referred as a matter of construction to one class and not two classes. I refer, in particular, to the decisions in *Hay's Trustees* v. *Baillie* (1), and *Paterson's Trustees* v. *Paterson* (2). The Scots law has not been argued before your Lordships, but I think that these decisions involve the application of rules of construction common both to English and Scottish law. For myself, I would allow the appeal and restore the judgment of Farwell J.

LORD PORTER. My Lords, it is common ground and undoubted law that, in construing a will, the object of the court is to try to ascertain the intention of the testator, but it is the expressed intention which must govern. The principle is succinctly expressed by Lindley L.J., as he then was, in *In re Morgan* (3): " Now, I do not see why, if we can tell what " a man intends, and can give effect to his intention *as expressed*, " we should be driven out of it by other cases or decisions in " other cases." The italics are mine. In construing what the testator has said, it is permissible to consider that he did not intend to die intestate: see per Lord St. Leonards in *Grey* v. *Pearson* (4). But technical words must be interpreted in their technical sense and " charity " or " charitable " are technical words in English law and must be so construed unless it can be seen from the wording of the will as a whole that they are used in some other than their technical sense. For this purpose and in order to discover the testator's intention it is the duty of the court to take into consideration the whole of the terms of the will and not to confine itself to the disputed words or their immediate context.

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(1) 1908 S. C. 1224.
(2) 1909 S. C. 485.
(3) [1893] 3 Ch. 222, 227, 228.
(4) 6 H. L. C. 61, 99.

In the present case the words whose interpretation is contested are "charitable or benevolent." It is admitted on behalf of the appellants that, if the word "benevolent" stood alone, it would be too vague a term and the gift would be void: see *James* v. *Allen* (1); but it is said that, when coupled with the word "charitable" even by the disjunctive "or," it either takes its colour from its associate, or is merely exegetical, and the phrase is used as implying either that "charitable" and "benevolent" are the same thing or that "benevolent" qualifies "charitable" so as to limit the gift to objects which are both charitable and benevolent.

In my view, the words so coupled do not naturally bear any of the meanings suggested. The addition of "benevolent" to "charitable" on the face of it suggests an alternative purpose and I do not see why in this collocation "benevolent" should be read as "charitable benevolent." Nor do I think that it can be said to be merely exegetical. Prima facie, these are alternative objects, and, even if they were not, the word "charitable," to be exegetical of "benevolent," should follow and not precede it. The wording should be "benevolent or "charitable" meaning "benevolent, i.e., charitable" not charitable or benevolent meaning charitable, i.e., benevolent. In the latter case the gift might still be said to be given to too wide a class, viz., to benevolent and not to charitable objects. In truth, however, anxious though one may be to strain the language used so as to benefit charities only, the weight of authority is too great to be readily overthrown.

Two matters of principle in the interpretation of wills are firmly established. (1.) The testator must make his own will and not leave his executors to make their choice of the objects of his bounty, subject to this, that a general gift to charity will be upheld. (2.) It is not, however, enough that he should leave property under a disposition in pursuance of which his assets may be disposed of to charities or for some other purpose, not even though his executors in fact apply them only to charitable purposes. "The question is" said Grant M.R. in *James* v. *Allen* (2), "what authority would this court have to say that "the property must not be applied to purposes however so "benevolent, unless they also come within the technical

(1) 3 Mer. 17.

(2) Ibid. p. 19.

"denomination of charitable purposes. If it might, consistently with the will, be applied to other than strictly "charitable purposes, the trust is too indefinite for the court to "execute." The same principle is enunciated in *Hunter* v. *Attorney-General* (1) where Lord Davey, in saying that the charitable purposes must not be mixed up with other purposes of such an indefinite nature that the court cannot execute them, gives as illustrations of such mixing the conjunction of "'charitable or benevolent,' or, 'charitable or philanthropic,' "or, 'charitable or pious'."

The various tribunals in England which have expressed their views as to this combination have all tended the same way. So long ago as 1836 Lord Cottenham L.C. expressed the opinion in *Ellis* v. *Selby* (2) that a gift to "charitable or other "purposes" was void. Similar opinions are to be found in *Attorney-General for New Zealand* v. *Brown* (3), in *Houston* v. *Burns* (4), and in *Attorney-General for New Zealand* v. *New Zealand Insurance Co., Ld.* (5), to quote but three from among those discussed in your Lordships' House or in the Privy Council. Indeed, in *Williams* v. *Kershaw* (6) a bequest of property for benevolent charitable and religious purposes was held void because it was considered that the testator could not have intended the recipient purposes to be benevolent and charitable and religious all at the same time, and, therefore, that "and" must be read disjunctively. I need not refer at length to the numerous cases decided in courts of first instance and in the Court of Appeal expressing a view similar to that contained in those quoted. If, however, the authorities be extended beyond those decided in a final court of appeal, the exact combination "charitable or benevolent" is to be found and was held void in *In re Jarman's Estate* (7). Nor is the force of these and the many other authorities to the same effect weakened by the fact that a bequest for charitable *and* benevolent purposes has been held a valid gift: see *In re Best* (8), since the conjunction in that case is effected by using "and" not "or." Nor by the decisions in *Attorney-General for New Zealand* v. *Brown* (3), where the wording was "charitable benevolent religious and "educational institutions societies associations and objects," and in *In re Bennett* (9), where the wording was "for the benefit

(1) [1899] A. C. 309, 323.
(2) 1 Myl. & Cr. 286, 299.
(3) [1917] A. C. 393.
(4) [1918] A. C. 337, 341.
(5) 53 T. L. R. 37.
(6) 5 Cl. & F. 111 n.
(7) 8 Ch. D. 584.
(8) [1904] 2 Ch. 354.
(9) [1920] 1 Ch. 305.

"of the schools, and charitable institutions, and poor, and other "objects of charity or any other public objects." In each of these last two cases it was held the complex phrases used must properly be construed so that "benevolent" or "public," as the case might be, took its colour from charitable and must be read as ejusdem generis with it. In so complex a form of words the ejusdem generis rule might well be prayed in aid, whereas in a simpler form it might be inapplicable.

In truth, however, the terms in which other wills are framed are but a loose guide to the construction of that in question. Each will must be interpreted in the light of its own wording. No doubt, the testator in the present case wished his estates to go to objects of a benevolent character or, as Goddard L.J. has it (1), to "charity in the popular sense:" but "charity" in that sense is not coterminous with "charity" in the technical sense, and I can find nothing in the wording of the will to lead to a different result. The fact that in another clause of this will the testator gave certain specific legacies leads nowhere, and a gift in the case of institutions limited to charitable ones followed by a gift to "other charitable or benevolent "objects," to my mind, suggests a widening of his beneficence in the latter case rather than a general charitable intent, if "charity" be used in its technical sense. The appellants, however, gain their strongest support from the Scottish decisions. In those cases "societies or institutions of a benevolent or chari-"table nature": *Hay's Trustees* v. *Baillie* (2); "such charities "or benevolent or beneficent institutions": *Paterson's Trustees* v. *Paterson* (3); and "charitable or philanthropic institu-"tions": *Mackinnon's Trustees* v. *Mackinnon* (4); have all been held valid charitable trusts, while in *Reid's Trustees* v. *Cattanach's Trustees* (5), a bequest in the form "poor persons in "Eskdale or such charitable educational or benevolent societies "or public institutions in Scotland" failed only, it appears, because of the addition of "public institutions." In all the cases where the gift was held good, the ratio decidendi appears to have been that the testator was designating one class of recipients, i.e., charities, not two or more separate classes of beneficiary. But Scottish law differs from English law on this point, probably because it approaches the subject from a different angle. In the first place the statute, 43 Eliz., c. 4, the benevolently interpreted

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(1) [1941] Ch. 253, 267.
(2) 1908 S. C. 1224.
(3) 1909 S. C. 485.
(4) 1909 S. C. 1041.
(5) 1929 S. C. 727.

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preamble of which forms the basis for determining what are charities in English law, never applied to Scotland, and, in the second, charities, speaking generally, are not controlled by the Scots courts. The ambit of "charity" in Scotland may be narrower than it is in England. At any rate, Lord Moncreiff thought so, as appears from his dissenting judgment in *Macintyre* v. *Grimond's Trustees* (1), afterwards approved in your Lordships' House (2). Whether it be narrower or not, it differs, and I do not think your Lordships can obtain any satisfactory guidance from the decisions in the Scottish courts in a case where the validity of a gift in an English will depends on its charitable nature. I find myself in accord with the judgment of the Master of the Rolls and agree that the appeal should be dismissed.

Lord Simonds. My Lords, the question raised in this appeal turns upon the meaning and effect of the will of Caleb Diplock. In the ordinary case it is the Attorney-General alone, representing the Crown as parens patriæ, who is heard on the question of validity or invalidity of such a bequest as that now under consideration. In the present case the actual distribution of the testator's estate and the pendency of proceedings by the next-of-kin for its recovery, in which this very question of validity would be vital, made it necessary to take the unusual course of adding the appellant institution as a defendant as representative of all the institutions which had received a share of the estate, but this fact is irrelevant to the construction of the will. Equally irrelevant are the facts which are brought to your Lordships' attention that the estate is a large one, that the next-of-kin are not near relatives, that the discovery of a possible flaw in the will was fortuitous, and that the proceedings were belated. The construction of this will is the same, whether its invalidity brings an unexpected windfall to distant relations or its validity disappoints the reasonable hopes of a dependent family.

My Lords, in stating the question for your Lordships' consideration I have said that it turns on the meaning and effect of the testator's will. Advisedly I have put "meaning" before "effect." For I approach this will, as I approach any other will, with the resolve to find the testator's intention from the language that he has used. When I have found it, I consider its effect. If there is an ambiguity, it may be that I am at liberty to choose that construction which will give legal effect to the instrument rather than that which will invalidate it. Where the testator's words would, if no question of invalidity arose, leave no doubt in my mind, I am not at liberty to create an ambiguity in order then to place what is sometimes called a benignant construction on the will.

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(1) 1904 6 F. 285, 293.

(2) [1905] A. C. 124, 127.

My Lords, the words for your consideration are " charitable " or benevolent." The question is whether, in the context in which they are found in this will, these words give to the executors a choice of objects extending beyond that which the law recognizes as charitable. If they do not, that is the end of the matter. The trust is a good charitable trust. If they do, it appears to be conceded by counsel for the appellant institution that the trust is invalid, but, in deference to the argument of the Attorney-General, who invited your Lordships to take a different view, I must say a few words at a later stage. My Lords, of those three words your Lordships will have no doubt what the first, " charitable," means. It is a term of art with a technical meaning and that is the meaning which the testator must be assumed to have intended. If it were not so, if in this will " charitable " were to be given, not its legal, but some popular, meaning, it would not be possible to establish the validity of the bequest. The last of the three words " benevolent " is not a term of art. In its ordinary meaning it has a range in some respects far less wide than legal charity, in others somewhat wider. It is, at least, clear that the two words, the one here used in its technical meaning, the other having only, and, accordingly, here used in, a popular meaning, are by no means coterminous. These two words are joined or separated by the word " or," a particle, of which the primary function is to co-ordinate two or more words between which there is an alternative. It is, I think, the only word in our language apt to have this effect. Its primary and ordinary meaning is the same, whether or not the first alternative is preceded by the word " either."

My Lords, averting my mind from the possible ill effects of an alternative choice between objects " charitable " and objects " benevolent," I cannot doubt that the plain meaning of the testator's words is that he has given this choice, and that, if he intended to give it, he could have used no words more apt to do so. Is there, then, anything in the context which narrows the area of choice by giving to the words " or benevolent " some other meaning than that which they primarily and

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naturally have? And if so, what is the other meaning which is to be given to them? Let me examine the second question first. Since the test of validity depends on the area of choice not being extended beyond the bounds of legal charity, a meaning must be given to the words "or benevolent" which retains them within these bounds. This result, it has been contended, may be reached by giving to the word "or" not its primary disjunctive meaning but a secondary meaning which may, perhaps, be called exegetical or explanatory. Undoubtedly "or" is capable of this meaning. So used, it is equivalent to "alias" or "otherwise called." The dictionary examples of this use will generally be found to be topographical, as "Papua or New Guinea," but, my Lords, this use of the word "or" is only possible if the words or phrases which it joins connote the same thing and are interchangeable the one with the other. In this case the testator is assumed to use the word "charitable" in its legal sense. I see no possible ground for supposing that he proceeds to explain it by another word which has another meaning and by no means can have that meaning. I must reject the exegetical "or." Then it was suggested that the words "or benevolent" should be construed as equivalent to "provided such objects are also of a benevolent character," that is to say, the objects must be charitable but of that order of charity which is commonly called benevolent. I think that this is only a roundabout way of saying that "or" should be read as "and," that the objects of choice must have the two characteristics of charitable and benevolent. It is possible that a context may justify so drastic a change as that involved in reading the disjunctive as conjunctive. I turn then to the context to see what justification it affords for reading the relevant words in any but their natural meaning. Reading and re-reading them, as your Lordships have so often done in the course of this case, I can find nothing which justifies such a departure. It is true that the word "other" introduces the phrase "charitable or benevolent object or objects" and to this the appellants attached some importance, suggesting that since "other" looked back to "charitable institution or "institutions," so all that followed must be of the genus charitable. There can be no substance in this, for in the phrase so introduced the word "charitable" is itself repeated and is followed by the alternative "or benevolent." Apart from this slender point it seemed that the appellants relied on what is called a general, a dominant, an over-riding, charitable intention, giving charitable content to a word or phrase which might otherwise not have that quality. That such a result is possible there are cases in the books to show. Some of them have been cited to your Lordships, but here again I look in vain for any such context. On the plain reading of this will I could only come to the conclusion that the testator intended exclusively to benefit charitable objects if I excised the words " or benevolent " which he has used. That I cannot do.

Coming to the conclusion that, on the true construction of this will, the executors may, if they think fit, distribute the testator's estate among objects which are benevolent but not charitable, I then ask what is in law the effect of such a disposition. My Lords, it may not have come as so rude a shock to some of your Lordships as it did to me to hear it suggested that there could be any doubt but that it is utterly invalid, but, in fact, the learned Attorney-General, if I understood his argument, categorically invited your Lordships to hold that a bequest for charitable or benevolent objects simpliciter is in English law a good and effective bequest, and urged that *In re Jarman's Estate* (1) which decided the contrary should be over-ruled. In other words, his contention was that to enlarge the executors' area of choice so as to include benevolent objects which are not charitable with objects which are charitable does not make the whole gift fail for uncertainty. I do not see how, if his proposition is a sound one, it could be limited to the introduction of benevolent objects. Philanthropic objects, liberal objects, perhaps patriotic or public objects, must come within the scope of this new doctrine. Nor, if a gift for charitable or benevolent objects is valid, could it be any longer contended with any show of logic that a gift for benevolent objects alone is invalid. My Lords, I suggest that this proposition runs counter to authority and principle. Were it necessary to examine the authorities, your Lordships would find that a more formidable task than the over-ruling of *In re Jarman's Estate* (1) lay before you. I say nothing of a chain of cases which goes back to Sir William Grant and Lord Eldon, who themselves rested on ancient precedent: see *Morice* v. *Bishop of Durham* (2). I refer only to the fact that in recent times Lord Davey in *Hunter* v. *Attorney-General* (3) and Lord Parker in *Bowman* v. *Secular Society, Ld.* (4), have selected such words as " charitable " or benevolent " as the very type of gift which fails by reason

(1) 8 Ch. D. 584.

(2) 10 Ves. 521.

(3) [1899] A. C. 309, 323.

(4) [1917] A. C. 406, 441.

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of the admixture of charitable with non-charitable objects. There is good reason why this should be so. It is a cardinal rule, common to English and to Scots law, that a man may not delegate his testamentary power. To him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries. To this salutary rule there is a single exception. A testator may validly leave it to his executors to determine what charitable objects shall benefit, so long as charitable and no other objects may benefit. To explain or to justify this exception is unnecessary. It conveniently and securely rests to-day on the theory that a charitable trust can be executed by the court, but a so-called benevolent trust cannot, for the court knows what is charitable by reference to the preamble to the statute of Elizabeth, to the objects there enumerated and all others which " by analogies are deemed " within its spirit and intendment," but what is benevolent the court knows not. It is possible that the exception was originally established on some broader ground of favour to charity, but into this I need not enter. It is sufficient to say that this exception in favour of charity having been long established, there is no ground for extending it in favour of objects which are not charitable. My Lords, I concur in the motion that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Thomas Eggar & Son.*

Solicitors for respondents: *Treasury Solicitor; White & Leonard & Nicholls & Co.; Preston, Lane-Claypon & O'Kelly; Field, Roscoe & Co., for Stapley & Hurst, Eastbourne.*

Distinguished. In re OAKES' SETTLEMENT [1951] 1 Ch. 156

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1944

June 19, 20;
July 27.

BARCLAYS BANK, LIMITED AND OTHERS . . APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . . RESPONDENT.

Revenue—Estate duty—" Money received under policy of assurance "—Assignment of policies and investments to trustees for benefit of settlor's son—Direction for payment of premiums out of income from investments—Policy not " wholly kept up " by settlor for benefit of son—Customs and Inland Revenue Act, 1889 (52 & 53 *Vict., c.* 7), *s.* 11, *sub-s.* 1—*Finance Act*, 1894 (57 & 58 *Vict., c.* 30), *s.* 2, *sub-s.* 1 (*c*).

The settlor assigned two policies of assurance which he had effected on his own life to trustees for the benefit of his son and others together with certain investments, from the income of which he directed the trustees to pay the premiums on the policies. On the settlor's death the Crown claimed estate duty on the amount of the policy moneys which had been paid to the trustees of the settlements, it being contended that the policies had been " wholly kept up " by the settlor " for the benefit of a donee " within the meaning of s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, with the result that the policy moneys were property " passing on the death of the deceased " within s. 2, sub-s. 1 (*c*), of the Finance Act, 1894:—

Held, that the policies were not " wholly kept up " by the settlor after the date of the settlements within the meaning of s. 11, sub-s. 1, of the Act of 1889, and, therefore, that the estate duty claimed was not payable.

Decision of the Court of Appeal (sub nom. *Attorney-General* v. *Barclays Bank, Ld.*) [1943] K. B. 721, reversed.

APPEAL from the Court of Appeal.

At some time before August 15, 1922, the settlor, the first Viscount Devonport, effected two policies of assurance on his own life with the Royal Insurance Co., Ld. in the sums of 70,000*l.* without profits and 5,000*l.* with profits. The annual premiums on the policies were 3,587*l.* 10*s.* and 132*l.* 14*s.* 2*d.* On August 15, 1922, the settlor executed a voluntary deed of family settlement for the benefit of his son, Gerald Chester Kearley, subsequently the second Viscount Devonport, and others. At the same time he transferred to the trustees of the settlement certain income-yielding investments on the primary trust to pay the premiums from time to time to become payable in respect of the policies out of the income thereof. The settlor had a special power of appointment under this settlement. Later, additional investments were transferred by the settlor to the trustees. The settlor exercised the power of appointment by a deed dated May 15, 1930, in favour of his son reserving to himself a power of revocation. He released this power by a second settlement of the same date made by his son, he and the trustees being parties thereto, by which settlement the arrangements for the destination of the trust assets were finally completed, the ultimate reversion, if it ever became effective, being for charitable objects. The settlor retained no control over the trustees and no interest under the settlements, under which he was divested of all right and beneficial interest whatsoever in the two policies of assurance and the investments held by the trustees, and there was no possibility of a resulting trust in his favour. The trustees were at all material times the legal owners of the policies. From the institution of the trust the premiums on the policies, which had been paid by the settlor from the date of the first settlement, were paid by the trustees as directed and were so paid solely for the benefit of the beneficiaries. The settlor died on September 5, 1934. The aggregate sum of 78,675*l*. then became payable in respect of the policies and was received by the appellants, the then trustees of the settlements. An English information, to which the appellants were defendants, was filed by the Attorney-General, the respondent, claiming estate duty and succession duty in respect of the property comprised in the settlements. He contended that under s. 2, sub-s. 1 (*c*) of the Finance Act, 1894, estate duty became exigible on the full amount of the policy moneys. The appellants contended that s. 2, sub-s. 1 (*c*), had no application, but that duty was exigible under s. 2, sub-s. 1 (*d*). Wrottesley J. and the Court of Appeal (Scott and MacKinnon L.JJ., Luxmoore L.J. dissenting) decided in favour of the respondent, holding that the policies were " wholly kept up " by the settlor " for the benefit of a " donee " within the meaning of s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, with the result that the policy moneys were " property passing on the death of the deceased " within s. 2, sub-s. 1 (*c*), of the Act of 1894. The appellants appealed to the House of Lords.

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* *Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT and LORD SIMONDS.

King K.C. and *Wilfrid Hunt* for the appellants. The settled policies as from the date of the first settlement were kept up, not by the settlor, but by the trustees out of the income of investments vested in them, in which the settlor had no beneficial interest. They held the property as principals. The settlor was not a beneficiary under the settlement and could not have had any remedy against them if they had not paid the premiums, since they were not his agents. If the settlor had become bankrupt or insane or an enemy alien it would have had no effect on the payment of the premiums, for he had parted with all power over the fund out of which they were paid. The answer to the question : Who kept up the policies ? could only be that it was the trustees, whereas s. 11, sub-s. 1 of the Customs and Inland Revenue Act, 1889, contemplates payments by the deceased. [They referred to *Lord Advocate* v. *Inzievar Estates* (1) ; *Smith* v. *Anderson* (2) ; *Lord Advocate* v. *Scott* (3) and *Tennant* v. *Smith* (4)]. It is under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, that the appropriate duty is exigible.

Sir Donald Somervell A.-G. and *J. H. Stamp* for the respondent. This case falls within s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. The expression " kept up " in s. 11, sub-s. 1, of the Act of 1889 is not a term of art, but is used in a vague and popular sense. What was done by the settlor falls aptly within its natural meaning. The sub-section contemplates the situation where the policy is wholly kept up by a donor and also that where it is partly kept up by him and partly by the donee. In applying the sub-section to cases as they arise the question for the court is : Who kept up the policy ? Was it the donor or the donee ? Normally the premiums would be paid by one or the other, but when they are not directly paid by either the question is : Who is paying them indirectly and out of whose fund do they come ? In the circumstances of this case they were " kept up " by the settlor, through the machinery of the settlements which he himself had created. The difference between paying them direct or under a trust established by him is immaterial. A policy is none the less " kept up " by a person because the provision for payment of the premiums is made by him in advance. It is not contended that the trustees paid the premiums either under contract or as agents for the settlor, but the premiums were paid throughout with money provided by him for that purpose. The money only came to the beneficiaries because the settlor had devoted a fund to keep up the policies. He created a duty to pay the premiums, and,

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(1) [1938] A. C. 402.

(2) (1879) 15 Ch. D. 247, 275.

(3) 1918 S. C. 720.

(4) [1892] A. C. 150, 154.

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even if no one else could enforce the trust, the court could intervene. [They referred to *In re Thorley. Thorley* v. *Massam* (1).]

The House took time for consideration.

July 27. VISCOUNT SIMON L.C. My Lords, I have had the advantage of reading the opinion prepared in this case by my noble and learned friend, Lord Macmillan. I agree entirely with that opinion and do not find it necessary to add any words of my own except that I move that the appeal be allowed.

LORD THANKERTON (read by LORD PORTER). My Lords, the only question in dispute is whether the estate duty is payable on the footing that two policies on the life of the deceased, under which sums amounting to 78,675*l.* were paid to the appellants on his death, were " kept up " by him within the meaning of s. 11, sub-s. 1 of the Customs and Inland Revenue Act, 1889, in which case estate duty would be payable on the whole value of the proceeds. With all respect to the learned judges who have held otherwise, I am clearly of opinion that these policies were not " kept up " by the deceased after the date of the settlements, and I agree with the opinion of Luxmoore L.J. The premiums were annual ones, and the crucial date in each year could not arrive until it became necessary to renew the currency of the policies for another year, because of the survival of the settlor. Payment of the premium necessary for renewal was made by the appellants over whom the settlor retained no control out of settled funds in which the settlor had no interest, and over which he retained no control. It cannot be maintained that the appellants made those payments as agents of the settlor, and the fact that the funds out of which the payments were met were originally settled by the settlor is not relevant, in my opinion. I agree with the statement by Luxmoore L.J. (2): " The funds were no longer " the property of the first viscount. They belonged in equity " to the beneficiaries who alone could compel the trustees to " carry out the trusts. The payment by the trustees of the " premiums was not made by them in any sense as agents for " the first viscount and cannot properly be described as being " payments made on the first viscount's behalf." I therefore

(1) [1891] 2 Ch. 613.

(2) [1943] K. B. 721, 729.

agree with the motion proposed by my noble and learned friend on the woolsack.

LORD MACMILLAN (read by LORD GODDARD). My Lords, were it not that the Attorney-General has succeeded in obtaining judgments in his favour (with one dissentient) in both courts below, I should have thought that the claim advanced by him was plainly untenable. The question at issue is simple and short. The answer, in my opinion, is equally so.

Stripped of details immaterial to the controversy, the facts are not complicated. The late Viscount Devonport effected two ordinary policies of assurance on his own life with the Royal Insurance Co., Ld. In 1922 he executed a family settlement and to the trustees thereby appointed he assigned his two policies. At the same time he transferred to the trustees certain income-yielding investments. The trustees were directed by the settlement to pay the annual premiums on the policies as they fell due out of the income of the trust. Additional investments were subsequently transferred by Viscount Devonport to the trustees, and in 1930 he executed a deed of appointment and a further deed of settlement, whereby he finally completed his arrangements for the destination of the trust assets. The position at Viscount Devonport's death on September 5, 1934, was that at least since 1930 he had been entirely divested of all right and interest whatsoever in the two policies of assurance and the investments held by the trustees. The premiums on the policies were from the institution of the trust paid by the trustees out of trust income as directed and were so paid solely for the benefit of the trust beneficiaries.

Policies of life assurance do not by their nature fit very logically into the scheme of estate duty, which is a duty leviable on property passing on death. They have, accordingly, been specially dealt with in the legislation. By the joint operation of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, s. 38 of the Customs and Inland Revenue Act, 1881, and s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, property passing on the death of a deceased is deemed to include " money received " under a policy of assurance effected by any person . . . " on his life, where the policy is wholly kept up by him for the " benefit of a donee, whether nominee or assignee, or a part of " such money in proportion to the premiums paid by him where " the policy is partially kept up by him for such benefit." In this way the proceeds of a life policy are rendered in whole or in part liable to estate duty on the death of the assured where the policy has been wholly or partly kept up by him for the benefit of a donee.

The contention of the Attorney-General in the present case was that, although all the premiums on the policies had been paid by the settlement trustees out of trust income since 1922, nevertheless the policies had been throughout that period kept up by Viscount Devonport. He expressly, and, in my opinion, rightly, declined to support the ground of the judgment in his favour by Wrottesley J., who heard the case in the first instance and took the view that the trustees had paid the premiums either under contract with, or as the agents of, Viscount Devonport—a misconception of the legal character of a trustee. The Attorney-General's argument was that a policy is none the less kept up by the assured and the premiums none the less paid by him by reason of his having in advance made provision for the payment of the premiums. This argument found favour with Scott and MacKinnon L.JJ. in the Court of Appeal, but was emphatically rejected by Luxmoore L.J. In my opinion, Luxmoore L.J. was right. To keep up a policy is to pay the premiums thereon as they fall due, and the person who pays the premiums is the person who keeps up the policy. The funds which yielded the income with which the premiums in the present case were paid were, no doubt, originally provided by Viscount Devonport, but when the premiums were actually paid he had no rights whatever in the income so employed. In no sense can it be said that when the settlement trustees paid the premiums it was Viscount Devonport who paid them. They paid them with their own trust moneys. You cannot make payments out of money with which you have already parted. You cannot keep up a policy with money which you have already given away. I would allow the appeal.

LORD WRIGHT (read by LORD PORTER). My Lords, the sole question in this appeal is whether estate duty on certain policies on the life of the settlor, on which sums amounting to 78,675*l.* were paid to the appellants, is exigible under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, or is exigible under s. 2, sub-s. 1 (*d*), of the same Act. The policies had been assigned to the appellants as trustees. The answer depends on whether the policies were "kept up" by the settlor within the meaning of the former provision, or whether the case fell within the latter provision, which applies to an interest provided by the deceased.

If the former sub-section applies, the Crown is entitled to duty on the whole amount of the policy moneys. If the latter sub-section applies, the Crown is only entitled to the charge in respect of the policy moneys limited to the value of an interest therein during the life of the present (the second) Viscount Devonport. The appellants do not contest that they are liable to the more limited extent, that is, to the extent of the value of the life interest, but they deny that they are chargeable on the full amount of the policy moneys. Wrottesley J. and the Court of Appeal (Luxmoore L.J. dissenting) have decided in favour of the Crown. The appellants contest that decision and maintain that the dissenting judgment of Luxmoore L.J. is correct and should receive effect.

Section 2 of the Finance Act, 1894, provides that property passing on the death of a deceased which is to be subject to death duty is to include (inter alia) certain property defined by reference to s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889. The provision material to this case so incorporated by s. 2, sub-s. 1 (*c*), of the Act of 1894 is as follows: "The charge . . . shall extend to money received under a "policy of assurance effected by any person dying after "June 1, 1889, on his life, where the policy is wholly kept up "by him for the benefit of a donee, whether nominee or "assignee, or a part of such money in proportion to the "premiums paid by him where the policy is partially kept up "by him for such benefit." These are the material words founded on by the Crown. With this language must be contrasted the words of s. 2, sub-s. 1 (*d*), which imposes the charge on the following property (as being property deemed to pass on the death), namely, "Any . . . interest purchased "or provided by the deceased either by himself alone or in "concert or by arrangement with any other person, to the "extent of the beneficial interest accuring or arising by sur-"vivorship or otherwise on the death of the deceased." Of the two contrasted sub-sections, it is the latter which the appellants say fits the position. The settlor, they say, did iindeed, provide the interest, but he did so by assigning by means of the voluntary settlement of May 15, 1930, to the original trustees certain securities the income from which was to constitute a fund out of which the premiums were to be paid, as, in fact, they were. The income was to be used, so far as necessary, to this end, and there were trusts as to any surplus over. I do not need here to recapitulate in detail the terms of the material settlements and the appointment. They are fully analysed by Luxmoore L.J. in his judgment. On these dispositions the first Lord Devonport, the settlor, did not himself in the ordinary sense of the word pay the premiums necessary to keep the policies alive. The trustees paid them. I think that "keeping up" a policy according to the ordinary use of language connotes payment of the premiums, which is the normal method of keeping up a policy. This generally involves periodical payments, and, though a single premium policy is not unknown, that would have the effect not so much of keeping up a policy as establishing its operation once and for all. The Act did not, apparently, contemplate this contingency, but, however that may be, the insertion of the words "in "proportion to the premiums paid by him" is necessary to deal with the case where the deceased did not himself wholly keep up the policy but only did so partially. In that case the death duty is to fall on the deceased's estate in proportion to the premiums paid by him. The change in expression from "kept up" to "premiums paid" is necessary to give the basis of apportionment, but at the same time it identifies "paying the premiums" with keeping up the policy. It is not necessary to speculate why this apportionment was provided for. The language of the sub-section seems sufficiently plain. It supports the view that when the Act refers to keeping up the policy it means the method of paying the premiums as they fall due.

The essential question, then, is whether the first Lord Devonport can be properly said to have kept up the policies after the settlement of August 15, 1922. I agree with Luxmoore L.J. that the question must be answered in the negative. In truth, once there was an express trust to provide for payment of the premiums fully constituted in the terms in which it was, the settlor had thenceforth nothing to do with keeping up the policies. That devolved on the trustees. The first Lord Devonport had divested himself of his property in the fund by his voluntary assignment of it to the trustees to hold on the trusts declared in the deeds. These trusts included keeping up the policies by paying the premiums, but the settlor did not himself pay them. That was the duty of the trustees under the trusts subject to which they held the fund. They did not pay the premiums as agents for the settlor, nor did they do so under any covenant or agreement with him, for there is nothing of the sort in the trust documents. The settlor could not revoke the trust or terminate the trustees' powers as he would have been able to do if they had been his agents, nor could he control the way in which they executed the trust or take steps to enforce it. He was not a beneficiary under the trust. The terms of the trust clearly excluded even any resulting trust in his favour in any contingency, however remote. The ultimate reversion, if it ever became effective, was for charitable objects. As he was not a beneficiary he could not invoke the powers of the court if he had found that the trustees were not duly performing the trust. The assignment of the fund to the trustees vested in them an absolute property in law, subject only to the equitable obligation, affecting their conscience, to fulfil the trust under which they held the property, an obligation enforceable only in equity at the suit of the beneficiaries.

I have ventured to state these propositions because they seem to negative the reasoning adopted in the courts below, and I may quote a brief passage from the judgment of James L.J. in *Smith* v. *Anderson* (1): "To my mind," he said, "the "distinction between a director" [the same would be generally true of any agents] "and a trustee is an essential distinction "founded on the very nature of things. A trustee is a man who "is the owner of the property and deals with it as principal, "as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the "relation of trustee, and who are his cestuis que trust." In the present case not only did the trustees pay the premiums as principals and not as agents for the settlor, but the money out of which they paid them was their own money in law, though in equity it was the money of the beneficiaries. It was not the settlor's money. The Court of Appeal did not hold that the trustees paid the premiums as agents of the settlor, but all the same they held that the settlor could be held to have paid the money within the meaning of s. 2, sub-s. 1 (*c*). Scott L.J. said (2): "The trust was the means by which Lord Devonport "ensured that his purpose of keeping up the policy out of his "own pocket 'for the benefit of a donee' (i.e. all the beneficiaries) would be achieved. I can see no practical reason "why it should matter whether the donor keeps it up directly "by himself paying the premium or indirectly by the machinery "of a trust." In the same way it was contended by learned counsel for the respondent that it was the settlor who kept up the policies because he created the machinery for keeping them up. The question, it was said, was: Who, in substance, performs the act ? With the greatest respect, I have found it impossible, consistently with the long-established principles relating to trusts in the English system of law, to agree with this reading of the effect of the Act. The phrase " keep up the " policies " is, no doubt, an ordinary expression, but the question is whether, within the meaning of the Act, it is the settlor who has kept them up. I have given the reasons which have led me to the conclusion that it is not true to say that he did so. I agree that the appeal should be allowed.

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(1) (1879) 15 Ch. D. 247, 275.

(2) [1943] K. B. 721, 727.

LORD SIMONDS (read by LORD GODDARD). My Lords, I agree in thinking that the order of the Court of Appeal cannot be upheld. The question is whether the policies had been wholly " kept up " by the settlor "for the benefit of a donee". If, as is contended by the Attorney-General and as was held by Wrottesley J. and the majority of the Court of Appeal, Luxmoore L.J. dissenting, they were so kept up by the settlor, then, under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, estate duty became exigible on the full amount of the policy moneys on the footing that they were " property which would be " required on the death of the deceased to be included in an " account under s. 38 of the Customs and Inland Revenue " Act, 1881, as amended by s. 11 of the Customs and Inland " Revenue Act, 1889." If, on the other hand, as is contended by the appellants and as was held by Luxmoore L.J., they were not so kept up, then s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, has no application, but it is conceded by the appellants that the appropriate duty under s. 2, sub-s. 1 (*d*), of that Act is exigible. The policy moneys were, as I have said, received by the appellants as trustees of certain settlements. I do not think it necessary to refer to them in detail. They are fully and accurately stated in the judgment of Luxmoore L.J.

The question has now to be answered : Were the policies on the life of the settlor, which he assigned by the settlement of August 15, 1922, to the trustees thereof, thereafter kept up by him for the benefit of a donee so that estate duty became exigible in respect of the policy moneys under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894 ? Wrottesley J. answers this question in the affirmative. His reasoning is summed up in these words (1) : " The first Lord Devonport filled the role described

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(1) (1942) 59 T. L. R. 52, 54.

"in the Act, in that he wholly kept up the policies by paying, "or, what is the equivalent, causing to be paid, duly and "punctually, the premiums on them." So, also, Scott L.J. (1), who thought that, in its context in the sub-section, the expression "keeping up" might be paraphrased as "taking "effective steps to prevent the policy lapsing," of which, no doubt, paying the premiums was an essential. So too, MacKinnon L.J. (2), who held that the first Lord Devonport kept up the policies in that all the premiums were paid out of trust funds provided for that purpose by him. This contention is put forward compendiously by the Attorney-General in the third of his formal reasons: "Because a policy is none the "less kept up by a person because the provision for payment of "the premiums is made by him in advance."

My Lords, I cannot assent either to the general proposition or to the application of it to this case. It may well be that a person may in certain circumstances be said to keep up a policy though another pays the premiums. Every case must be examined on its merits. Much will depend on the relation in which the one person stands to the other, but to me it seems plain that according to the ordinary use of language, which, in the absence of some compelling context, I must suppose Parliament to have intended, a person cannot be said to keep up a policy merely because he has provided a fund out of which the premiums were intended to be, and were, in fact, paid. If, as each premium becomes payable, it lies with him to say whether or not it shall be paid—if, to take the simplest case, the hand that pays is the hand of his agent acting according to his direction—I should have no difficulty in saying that he keeps up the policy, but, equally, where the payment is made by a trustee whose duty and right it is to pay whether the settlor wills it or not, it is not he but the trustee who pays the premiums and keeps up the policy. And this appears to me more emphatically to be the case when, as here, the settlor has not even a right to intervene and require the trustee to perform his trust. With the greatest deference to those who have thought otherwise, I do not think that any assistance is to be derived from the fact that the expression "keep up" in relation to a policy of assurance is not a term of legal art. I agree that it is not a term of legal art, but it is, I think, the most appropriate expression in our language to describe the doing of those acts which will prevent a policy lapsing. I see nothing vague or

(1) [1943] K. B. 721, 726.

(2) Ibid. 727.

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popular in the expression. The question is: Who keeps up the policy? Who does those acts which prevent the policy lapsing? Who, in fact, pays the premiums? I see no justification for ascribing those acts to a settlor who neither does them himself nor is competent to direct their performance. I do not base my opinion on the juxtaposition of the words " premiums paid " by him " to the words " kept up," for it is by the payment of premiums that a policy is ordinarily kept up. My opinion would be the same if the sub-section ended with the word " assignee."

The conclusion to which I have come as a matter of interpretation of the relevant words of the section does not need to be justified by any consideration of the general scheme of taxation for estate duty purposes. I doubt whether in any case it would be justifiable to do so, for it is well recognized that policies of insurance are a kind of property having peculiar characteristics and requiring special provision, but it may at least be said that there is nothing incongruous in policy moneys, like any other form of property, not being liable to estate duty under s. 2, sub-s. 1 (*c*), of the Act if the deceased, having parted out and out both with the policies and with a fund provided by him for keeping them up and reserved to himself no interest whatever in either property, then survives for the requisite period. I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Waterhouse & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

END OF VOL. AND OF APPELLATE SERIES for 1944.

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